IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-879

THOMAS E. ZABLOCKI,
Milwaukee County Clerk,
individually, in his official capacity,
and on behalf of all other
persons similarly situated,
Appellant,

v.

ROGER G. REDHAIL,
individually and on behalf of
all other persons
similarly situated,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Jurisdictional Statement

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CASES CITED

appellant from denying applications for marriage licenses on the grounds that the applicant had failed to comply with the provisions of sec. 245.10 (1), Wis. Stats. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented herein.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin, dated August 31, 1976, is reported at —— F. Supp. ——. A copy of this opinion is found in the Appendix hereto (Ap. 1).

JURISDICTION

This is an action for declaratory and injunctive relief brought under the Civil Rights Act, 42 U.S.C. § 1983, by the appellee as an individual and on behalf of all persons similarly situated against a named defendant who is a Milwaukee County Clerk and against all such persons similarly situated. Jurisdiction of the district court was invoked under 28 U.S.C. § 1343 (3). A three-judge district court was convened and a final order of that court granting declaratory and injunctive relief was entered on August 31, 1976. Notice of appeal therefrom was filed on October 28, 1976. Copies of the order and notice of appeal are included in the Appendix hereto (Ap. 23, 24).

The jurisdiction of this Court to review the order of the three-judge court by direct appeal is conferred by 28 U.S.C. § 1253. Cases sustaining the jurisdiction of the United States Supreme Court to hear this appeal include *Goldstein v. Cox*, 396 U.S. 471 (1970); *Wyman v. Rothstein*, 398 U.S. 275 (1970).

WISCONSIN STATUTE INVOLVED

Section 245.10 (1), (4) and (5), Wis. Stats.

"245.10 Permission of court required for certain marriages. (1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown, and, if the minor issue were of a prior marriage, unless a 5-day notice thereof is given to the family court commissioner of the county where such permission is sought, who shall attend such hearing, and to the family court commissioner of the court which granted such divorce judgment. If the divorce judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding under s. 52.37 or divorce action of such person in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section may be

waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting such marriage is filed with said county clerk.

* * *

(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

(5) This section shall have extraterritorial effect outside the state; and s. 245.04 (1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.

QUESTIONS PRESENTED

I. Does the classification created by sec. 245.10 (1), Wis. Stats., comply with the requirements of equal protection?

II. Where a state has legitimate and substantial interests in regulating domestic relations of its residents, should the abstention doctrine be applied requiring the dismissal of a complaint filed in federal district court?

III. Does due process require a notice to members of a class if the judgment is to be binding upon them?

STATEMENT OF FACTS

In January of 1972, a paternity action was commenced in the County Court, Civil Division, of Milwaukee County, Wisconsin, against appellee Roger G. Redhail in which it was alleged that he was the father of a baby girl born out of wedlock on July 5, 1971. On February 23, 1972, Rehail appeared and admitted that he was the father of the child. On May 12, 1972, Redhail was adjudged the father of the child born on July 5, 1971, and was ordered to pay $109 per month as support for the child until she reached eighteen years of age, and was also ordered to pay court costs.

At the time of his admission of paternity, Redhail was a minor and a high school student. From May of 1972 until August of 1974, he was unemployed, indigent, and unable to pay any support obligation. No payments were, therefore, made, and as of December 24, 1974, there was an arrearage in excess of $3,732.

Redhail's child has been a public charge since her birth and is currently receiving benefits under the Aid to Families with Dependent Children ("AFDC") program in excess of $109 per month.

On September 27, 1974, Redhail filed an application for a marriage license with appellant Thomas E. Zablocki. Zablocki is the County Clerk of Milwaukee County and is responsible for the issuance of marriage licenses in Milwaukee County pursuant to § 245.05, Wis. Stats. On September 30, 1974, an agent of Zablocki denied Redhail's application for a marriage license and refused to issue a marriage license because Redhail failed to comply with § 245.10 (1), Wis. Stats., in that he did not have a court order granting him permission to marry.

The complaint in this action was filed on December 24, 1974. Since a permanent injunction restraining the enforcement of a state statute was requested, the action was one requiring a three-judge district court, 28 U.S.C. § 2281.

Designation of a three-judge court was requested, and on January 6, 1975, the Chief Judge of the Seventh Circuit entered an order designating this three-judge court pursuant to 28 U.S.C. § 2284. Appellant subsequently filed his answer. Notice was given to the governor and the attorney general pursuant to 28 U.S.C. § 2284 (2).

On February 18, 1975, appellee filed a motion for a class action. The motion sought to have the action maintained as a class action on behalf of all Wisconsin residents subject to the provisions of § 245.10 (1) and against a class consisting of all the county clerks within Wisconsin. By order dated February 20, 1975, Judge Reynolds ordered that the action proceed as a class action pursuant to Rule 23 (b) (2), Federal Rules of Civil Procedure, on behalf of a class of plaintiffs defined as follows:

> "All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to § 245.10 (1), Wis. Stats. (1971)."

The members of the appellant class of county clerks were never given notice of the pendency of the action. No notice, either individual or otherwise, was directed at the appellee class in this proceeding. (Page 7, Appendix).

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL

I. The Important And Unsettled Question Of The Impact Of The Equal Protection Clause On State Marriage Laws Is Here Presented.

Marriage has long been recognized as a basic civil right and fundamental to man's very existence and survival. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Nevertheless,

marriage and the marital relationship have always been subject to the control of the state legislature. The wishes and desires of an individual must yield to the public welfare as determined by the public policy of the state. *Kitzman v. Werner*, 167 Wis. 308, 166 N.W. 789 (1918). As a matter of fact, this Court has recognized that the state has an "absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created ..." *Pennoyer v. Neff*, 95 U.S. 714, 735 (1877).

The *Loving* and *Pennoyer* cases, *supra*, represent two different viewpoints of this Court. It is time the Court more fully decide the question of the impact of the Equal Protection Clause on state marriage laws. The decision of the three-judge district court herein mandates such action by this Court because the district court has imposed its own policy upon a state by erroneously applying the strict scrutiny test to a social regulation.

Section 245.10, Wis. Stats., was designed to protect the children of a previous marriage by emphasizing the need to support the present family before new obligations through marriage were incurred. 49 Marq. L. Rev. 169 (1965). In furtherance of this substantial interest, the legislature declared as policy of the state that a marriage license would not be issued until the applicant has satisified the court that his or her children do not have to rely on public assistance for their support.

It would be rigid sophistry to view the case at bar as involving simply the right to marry in the abstract. It is the right to marry where the applicant already has minor children to support. The right to marry per se is not involved. The state's interest in the children of the applicant is correspondingly stronger than it would be if the right to marriage were simply involved. It is the interest in the children of a marriage applicant that must be measured against his interest in marriage or remarriage. While the Equal Protection Clause prohibits states from discriminating

between rich and poor as such in the formulation and application of their laws, it is a far different thing to suggest that equal protection prevents a state from adopting a law of general applicability that may affect poor persons differently than it does those who are more wealthy. "... At least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *San Antonio Ind. School District v. Rodriguez*, 414 U.S. 1 (1973). "Ability to pay should not be confused with opportunity to pay" *Llamas v. Department of Transportation*, 320 F. Supp. 1041, 1044 (E.D. Wis. 1969).

On its face, sec. 245.10, Wis. Stats., does not create any classification based on wealth. It applies generally to rich and poor alike. That it may affect persons differently does not constitute invidious discrimination. Such a result flows directly from the economic system, not the law. The law merely withholds issuance of a license to remarry until a showing that obligations incurred from the first marriage are met. The state's substantial interest in protecting the children of non-custodial parents provides more than a reasonable basis for the statutory classification involved. The district court's application of the strict scrutiny test under the circumstances of this case ignores the traditional standard for applying equal protection in cases involving social and economic regulation under *San Antonio Ind. School District, supra*, and in *Dandridge v. Williams*, 397 U.S. 471 (1970).

II. This Case Presents An Opportunity To Extend Or Limit The Doctrine Of Abstension.

The doctrine of federalism set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and extended to civil proceedings in *Hoffman v. Pursue*, 420 U.S. 592 (1975), was considered by the district court in the case at bar. In that no state proceedings had been initiated by the appellee, the district court rejected the *Younger* doctrine as being applicable to the proceedings before it.

There are probably as many different marriage requirements as there are states. The regulation of marriage is, of course, purely a state function. As evidence of the limitation of the federal judiciary to survey state statute books under the Fourteenth Amendment, one need look no further than the *Younger* doctrine. There is a correlative principle implicit in the federal-state relationship applicable to the instant case. Under *Reetz v. Bozanich*, 397 U.S. 82 (1970), it was announced that a federal court, in the interest of comity should stay its hand where the issue of state law is constitutionally uncertain, and where no opportunity had been afforded to state courts for review. Accordingly, it is suggested that the district court should have required the appellee to repair to the state court in the traditional state area of marriage regulation and in view of the fact that a Wisconsin state court has had no opportunity to decide the question of the constitutionality of sec. 245.10, Wis. Stats.

III. This Case Presents An Opportunity To Decide Unsettled Questions About Class Actions.

This action was not only commenced as a class action on behalf of appellee, it also embraced a class of appellants. The latter class amounted to 72 in number. No notice was ever given to members of this class. (Ap. 7). Whether due process requires a notice to members of the class if the judgment is to be binding upon them has not been decided uniformly. There is a split of authority between the circuits. (Ap. 7).

Relative to the appellee's class involved in this proceeding, it is noted that the named appellee never was a married person. Yet, the defined class is so broad as to include divorced persons as well.

While there is a need for the device of class actions, that device is subject to abuse and was abused in the case at bar.

Class actions are becoming increasingly popular, but this Court has answered very few of the many questions which arise about them. Basic questions here presented have not been decided and do require decision by this Court.

CONCLUSION

For the reasons stated above this Court should either summarily reverse the order herein and remand the case to the district court with directions to dismiss the action or should note probable jurisdiction.

Respectfully submitted,

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APPENDIX

CIVIL ACTION (Formal parts omitted)

Before TONE, Circuit Judge, and REYNOLDS and WARREN, District Judges.

REYNOLDS, District Judge. This is a class action challenging the constitutionality of a Wisconsin statute, §245.10 (1), (4), and (5) (1973),/[1] which requires certain residents to obtain court permission before they can marry. The action is brought pursuant to 42 U.S.C. §1983, and jurisdiction is conferred by 28 U.S.C. §1343 (3). *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). The statute is attacked on the grounds that it conflicts with rights secured by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. The relief sought includes a declaratory judgment that the statute is unconstitutional as well as an injunction restraining its enforcement. We hold that the statute violates the Fourteenth Amendment's equal protection clause and that the relief requested should be granted.

In January of 1972, a paternity action was commenced in the County Court, Civil Division, of Milwaukee County, Wisconsin, against plaintiff Roger G. Redhail in which it was alleged that he was the father of a baby girl born out of wedlock on July 5, 1971. On February 23, 1972, Rehail appeared and admitted that he was the father of the child. On May 12, 1972, Redhail was adjudged the father of the child born on July 5, 1971, and was ordered to pay $109 per month as support for the child until she reached eighteen years of age, and was also ordered to pay court costs.

At the time of his admission of paternity, Redhail was a minor and a high school student. From May of 1972 until August of 1974, he was unemployed, indigent, and unable to pay any support obligation. No payments were, therefore, made, and as of December 24, 1974, there was an arrearage in excess of $3,732.

Redhail's child has been a public charge since her birth and is currently receiving benefits under the Aid to Families with Dependent Children ("AFDC") program in excess of $109 per month. Thus, the child would be a public charge even if Redhail were current in the payment of support ordered in the paternity action.

On September 27, 1974, Redhail filed an application for a marriage license with defendant Thomas E. Zablocki. Zablocki is the County Clerk of Milwaukee County and is responsible for the issuance of marriage licenses in Milwaukee County pursuant to §245.05, Wis. Stats. On September 30, 1974, an agent of Zablocki denied Redhail's application for a marriage license and refused to issue a marriage license solely because Redhail failed to comply with §245.10 (1), Wis. Stats., in that he did not have a court order granting him permission to marry.

The complaint in this action was filed on December 24, 1974. Since a permanent injunction restraining the enforcement of a state statute was requested, the action was one requiring a three-judge district court, 28 U.S.C. §2281. Designation of a three-judge court was requested, and on January 6, 1975, the Chief Judge of the Seventh Circuit entered an order designating this three-judge court pursuant to 28 U.S.C. §2284. Defendant subsequently filed his answer. Notice was given to the governor and the attorney general pursuant to 28 U.S.C. §2284 (2).

On February 18, 1975, plaintiff filed a motion for a class action. The motion sought to have the action maintained as a class action on behalf of all Wisconsin residents subject to the provisions of §245.10 (1) and against a class consisting of all the county clerks within Wisconsin. By order dated February 20, 1975, Judge Reynolds ordered that the action proceed as a class action pursuant to Rule 23 (b) (2), Federal Rules of Civil Procedure, on behalf of a class of plaintiffs defined as follows:

> "All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to §245.10 (1), Wis. Stats. (1971)."

The order also established a briefing schedule in the event plaintiffs desired to maintain the action against a class consisting of all the county clerks. While plaintiffs filed a brief in support of the motion, defendant Zablocki has never filed a brief in opposition.

Following the filing of a stipulation of facts and briefs, oral argument was held on June 23, 1975, in which a representative from the Wisconsin attorney general's office participated. The Court requested the parties to discuss the applicability of *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), and plaintiffs later filed a memorandum on this issue.

II.

Before reaching the merits, it is necessary to discuss the *Huffman* issue as well as to decide whether the action should be maintained against a class of defendants consisting of all the county clerks in the State of Wisconsin.

A.

In *Younger v. Harris*, 401 U.S. 37 (1971), the Court held that federal courts must refrain from granting injunctions which would interfere with pending state criminal proceedings in the absence of extraordinary circumstances such as when there is a showing of "bad faith" or "harrassment" by the state officials responsible for the prosecution, supra at 54, or where the state law to be applied is "'flagrantly and patently violative of express constitutional prohibitions,'" supra at 53. In a companion case, *Samuels v. Mackell*, 401 U.S. 66 (1971), the same absention doctrine was held to apply to granting declaratory judgments./[2]

Huffman v. Pursue, Ltd., supra, extended *Younger* to a situation where the state court action, although nominally civil rather than criminal, was "in important respects *** more akin to a criminal prosecution than are most civil cases. The State is a party *** and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. ***" Supra at 604. *Huffman* also held that the federal plaintiff who has lost at the state court trial "must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger*." Supra at 608. The Court did not, however, decide whether *Younger* applies to *any* type of state court proceeding. Supra at 607.

In the circumstances of this action, it is unnecessary to decide whether *Younger* should be further extended. Plaintiff Redhail did not petition a state court for permission to marry under the provisions of §245.10 (1) after he was denied a marriage license. There is, therefore, no pending state proceeding which would be frustrated by granting the relief requested. In the absence of a pending state criminal prosecution, both declaratory judgments and injunctions may be issued. *Steffel v. Thompson*, 415 U.S. 452 (1974); *Doran v. Salem Inn, Inc.*, — U.S. —, 43 U.S.L.W. 5039 (June 30, 1975). Thus, even assuming that *Younger* should be held to apply to any type of state court proceeding, since plaintiff Redhail never initiated a proceeding under §245.10 (1), there is no threat to the "principle underlying *Younger* and *Samuels* *** that state courts are fully competent to adjudicate constitutional claims ***." *Doran v. Salem Inn, Inc.*, supra, at 5041.

Nor is there any requirement that a federal plaintiff in an action under 42 U.S.C. §1983, such as Redhail, first apply to state courts for relief. *Monroe v. Pape*, 365 U.S. 167 (1961), established the principle that exhaustion of state remedies is not a prerequisite to commencing a §1983 action. See also,

Wilwording v. Swenson, 404 U.S. 249 (1971); *McNeese v. Board of Education*, 373 U.S. 668 (1963).

There is, therefore, no barrier to consideration of plaintiffs' claims on the merits even if the principles of *Younger* and *Huffman* are held to apply to any state court proceeding./[3]

B.

Plaintiffs seek to have this action maintained as a class action as to defendants under Rule 23 (b) (2) of the Federal Rules of Civil Procedure. The defendant class is defined in the complaint as "all county clerks of counties within the State of Wisconsin, all of whom are required by §245.10 (1) WIS. STATS. (1971) to refuse to issue marriage licenses to members of the class of plaintiffs without a court order." As stated above, defendant Zablocki has not filed a brief indicating why this action should not be allowed to proceed against a class of defendants.

Rule 23 (a) prescribes the essential prerequisites that must be satisfied for any class action. They are satisfied here. First, the class of defendants, consisting of the seventy-two county clerks in Wisconsin, is "so numerous that joinder of all members is impracticable." Rule 23 (a) (1). Next, there is a question of law common to all the members of the class — the constitutionality of the challenged statute. Thirdly, the claims and defenses of the representative party, defendant Zablocki, are "typical of the claims or defenses of the class," Rule 23 (a) (3), since Zablocki's contention that his action in refusing a marriage license to Redhail was justified by the statute would undoubtedly be asserted by the other county clerks. Finally, defendant Zablocki is a representative party who "will fairly and adequately protect the interests of the class," Rule 23 (a) (4). Not only is defendant Zablocki's interest identical to that of the other county clerks, but the attorney representing him is from the Milwaukee County Corporation Counsel's office

which is experienced in conducting federal litigation. Furthermore, the Attorney General of Wisconsin has taken an active part in this action, urging that the challenged statute be upheld.

Besides fulfilling the prerequisites of Rule 23 (a), a class action must fit within one of the three types of class actions established by Rule 23 (b). Plaintiffs seek to have the action proceed under Rule 23 (b) (2):

> "[T]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; ***."

A Rule 23 (b) (2) class action is particularly appropriate in civil rights cases, although the rule is not so limited. 3B Moore's Federal Practice ¶ 23.40, at 23-651-23-654 (2d ed. 1974); C. Wright, Law of Federal Courts, §72, at 312 (2d ed. 1970); Advisory Committee's Note to 1966 Amendment, 39 F.R.D. 102 (1966). While the language of Rule 23 (b) (2) does not expressly provide for its use where declaratory or injunctive relief is sought against a class, such class actions have been ordered. *Danforth v. Christian*, 351 F. Supp. 287 (W.D. Mo. 1972); *Rakes v. Coleman*, 318 F. Supp. 181 (E.D. Va. 1970); *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), aff'd *sub. nom. Lee v. Washington*, 390 U.S. 333 (1968). See, 3B Moore's Federal Practice ¶ 23.40, 1974 Supplement, at 86. Where, as here, a statute with statewide application is challenged on the ground of its unconstitutionality, allowing the action to proceed against the class of officials charged with its enforcement is in accordance with the interests of judicial administration and justice which Rule 23 is meant to further.

At oral argument, it was pointed out that the members of the defendant class of county clerks have never been given notice of the pendency of this action. Indeed, no notice, either individual or otherwise, has been directed at the members of

the plaintiff class. Rule 23 itself does not require notice to the members of a (b) (2) class, since the mandatory notice provisions of Rule 23 (c) (2) are by their terms inapplicable, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 n. 14 (1974), and the notice provision of Rule 23 (d) (2) is discretionary with the Court. Advisory Committee's Note to 1966 Amendment, 39 F.R.D. 106. The question thus presented is whether due process requires notice to the absent members of a (b) (2) class.

On this question there exists a split of authority. Some courts have ruled that due process requires notice to the members of (b) (2) class if the judgment is to be binding on them. See, e.g., *Zeilstra v. Tarr*, 466 F. 2d 111 (6th Cir. 1972); *Schrader v. Selective Service System Local Board No. 76 of Wisconsin*, 470 F. 2d 73 (7th Cir.), cert. denied, 409 U.S. 1085 (1972); *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2nd Cir. 1968), on remand, 52 F.R.D. 253 (S.D. N.Y. 1971); 54 F.R.D. 565 (S.D. N.Y. 1972); reversed, 479 F. 2d 1005 (2d Cir. 1973); vacated and remanded, 417 U.S. 156 (1974); *Pasquier v. Tarr*, 318 F. Supp. 1350 (E.D. La. 1970), aff'd, 444 F. 2d 116 (5th Cir. 1971). Other courts have held that no notice need be given to the class members because due process is satisfied when the class is adequately represented by counsel. See, e.g., *Hammond v. Powell*, 462 F. 2d 1053 (4th Cir. 1972); *Yaffe v. Powers*, 454 F. 2d 1362 (1st Cir. 1972); *Lund v. Affleck*, 388 F. Supp. 137 (D.R.I. 1975); *White v. Local No. 207 of Laborer's Intl. Union*, 387 F. Supp. 53 (W.D. La. 1974); *Mayer v. Weinberger*, 385 F. Supp. 1321 (E.D. Pa. 1974); *Souza v. Scalone*, 64 F.R.D. 654 (N.D. Calif. 1974); *American Finance System, Inc. v. Harlow*, 65 F.R.D. 94 (D.Md. 1972); *Watson v. Branch County Bank*, 380 F. Supp. 945 (W.D. Mich. 1974); *Lynch v. Household Finance Corp.*, 360 F. Supp. 720 (D. Conn. 1973); *Hooks v. Wainwright*, 352 F. Supp. 163 (M.D. Fla. 1972). The commentators have been critical of the line of cases requiring notice to (b) (2) class members. 3B Moore's Federal Practice ¶ 23.55, at 23-1152—23-1153; 7A Wright and Miller, Federal Practice and Procedure, §§1786, 1793, at 142-144, 203-205; Miller, "Problems of Giving Notice in Class Actions," 1973, 58 F.R.D. 313, 313-316.

The most extensive treatment of the problem is by Chief Judge Fox in *Watson v. Branch County Bank*, supra, at 956-960. We are in general agreement with the conclusions stated therein. An ironclad rule requiring individual notice to members of a (b) (2) class would significantly frustrate use of (b) (2) class actions. It has been pointed out that when members of a (b) (2) class are in the role of plaintiffs, notice would not serve a useful purpose since members of such a class may not "opt out" and thereby prevent an adjudication of their legal interests.

Air Line Stewards and Stewardesses Assn., Local 550 v. American Airlines, Inc., 490 F. 2d 636, 642 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974). Furthermore, where the (b) (2) class includes a large number of persons whose identities and whereabouts are unknown, individually mailed notices may well be impossible and notice by publication similarly futile. While we are mindful of the Court's statement in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156. 176 (1974), that "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs," imposition of a notice requirement on (b) (2) class actions as a matter of due process should be avoided since "the named plaintiffs in class actions raising broad constitutional or statutory questions simply cannot afford to pay for notice to absent class members, and [such] a requirement * * * prevents the suit from being maintained as a class action." *Watson v. Branch County Bank*, 380 F. Supp. 945, 959 (W.D. Mich. 1974). We agree with Chief Judge Fox that the discretionary notice provisions of Rule 23 (d) (2) are at least presumptively valid as complying with due process, which must be tailored to the "character of the proceedings and the nature of the interest * * * involved * * *." *Mullane v. Central Hanover Bank & Trust Co., Trustee*, 339 U.S. 306, 317 (1950).[3b]

The remaining question is, therefore, whether there are special circumstances in this action which require notice to

the members of either the plaintiff or defendant class. Rule 23 (d) (2) sets forth a list of the special circumstances which might require notice:

> "In the conduct of actions to which this rule applies, the court may make appropriate orders: * * * (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defense, or otherwise to come into the action; * * *."

As to the members of the plaintiff class, there is no necessity for notice, since the representation of their interests has been "fair and adequate" and no intervention by class members is either necessary or desirable. We are also convinced, as stated above, that the representation afforded the interests of the defendant class has been more than adequate and that intervention at this stage of the action is not needed. Defendant Zablocki will, however, be required to send a copy of the judgment to all the members of the defendant class of county clerks.

In summary, the previous order establishing the class of plaintiffs is affirmed, and this action is further determined to be a class action with respect to all county clerks within the State of Wisconsin, all of whom are required by § 245.10 (1), Wisconsin Statutes (1973), to refuse to issue marriage licenses to members of the class of plaintiffs without court order. No prejudgment notice to the members of either class is required by either Rule 23 or due process, although notice of the judgment will be provided to the members of the defendant class.

III.

A.

The challenged statute, § 245.10 (1), creates two groups of Wisconsin residents who desire to marry and subjects one of the groups, the plaintiff class in this action, to special treatment. This group consists of persons who have minor issue not in their custody whom they are under an obligation to support by a court order or judgment. In order for these persons to obtain a marriage license, they must obtain a court order granting them permission to marry. None of the county clerks in Wisconsin can lawfully issue a marriage license to such persons in the absence of a court order. Any member of the burdened class who wishes to marry outside Wisconsin must obtain a court order prior to the marriage. Section 245.10 (4), Wis. Stats.; *State v. Mueller,* 44 Wis. 2d 387, 171 N.W. 2d 414 (1969). Any marriage by a member of the plaintiff class contracted without compliance with the statute is void, whether it is entered into within Wisconsin or elsewhere, § 245.10 (5). Under § 245.30 (l) (f),/[4] persons who obtain marriage licenses without complying with § 245.10 are subject to criminal penalties. See, *State v. Mueller,* supra.

In order to obtain a court order granting permission to marry, a verified petition must be filed with the court that granted the judgment or support order, or the court having divorce jurisdiction in the county wherein the issue reside or the marriage license application is made. The court must then schedule a hearing at which both parties to the intended marriage are required to appear. Notice of the proceeding must be given to the custodian of the minor issue and, if the minor issue was of a previous marriage, to the family court commissioner of the county where permission is being sought and the family court commissioner of the court which granted the divorce judgment. At the hearing, the marriage license applicant must prove compliance with the prior support obligation and also that the children "are not then and are not likely thereafter to become public charges * * *." § 245.10 (1), Wis. Stats. (1973).

The effects of the statute on plaintiff Redhail should be carefully noted. He is unable to marry anywhere without a court order so long as he maintains his Wisconsin residency. Were he to petition a court for permission to marry, the court would have to deny the petition since Redhail's indigency has made it impossible for him to satisfy the support obligation ordered in the paternity action. Furthermore, even if he could somehow pay the arrearage, because his child receives AFDC benefits in excess of the $109 per month support obligation, the child would still be a public charge.

In determining whether the classification created by the statute complies with the requirements of equal protection, it is necessary to first decide what intensity of scrutiny it must be subjected to and then examine the interests arguably furthered by the statute.

B.

Under the equal protection approach currently utilized by the Court, statutory classifications are generally measured against the rational relationship test and are upheld if they are rationally related to some legitimate governmental interest. *United States Department of Agriculture v. Moreno,* 413 U.S. 528 (1973); *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973). If, however, the classification impinges upon fundamental rights or constitutes a suspect classification, it is subjected to strict scrutiny and can be upheld only if it is necessary to promote compelling governmental interests and is narrowly drawn to express only such interests. *Roe v. Wade,* 410 U.S. 113, 155 (1973); *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969).

In our society, marriage has long been regarded as one of the most basic social institutions, and the corresponding individual interests involved have been recognized as within the constitutional rights of privacy as enunciated in *Roe v. Wade,* supra, at 152-153. As Mr. Justice Douglas, writing for the majority in *Griswold v. Connecticut,* 381 U.S. 479, 486 (1965), stated:

> "We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

A long line of decisions make it evident that although not explicitly set forth in the constituion, there is a constitutionally protected right to marry which occupies the status of being a fundamental right. *Roe v. Wade*, supra, at 152: *United States v. Kras*, 409 U.S. 434, 444 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, supra, at 486, 495; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Lower federal courts have also recognized the importance of the interests associated with marriage and have afforded them constitutional protection. See, e.g., *O'Neill v. Dent*, 364 F. Supp. 565, 568-569 (E.D. N.Y. 1973); *Holt v. Shelton*, 341 F. Supp. 821, 822-823 (M.D. Tenn. 1972); *Wymelenberg v. Syman*, 328 F. Supp. 1353, 1354 (E.D. Wis. 1971).

It is apparent that the challenged statute infringes upon plaintiff Redhail's ability to marry. In contrast to all other Wisconsin residents, he, and all the members of the class he represents, must obtain court permission before any county clerk in Wisconsin will issue a marriage license. Furthermore, other provisions of the statute give it extra-territorial effect, making it impossible for Redhail, or anyone in the plaintiff class, to enter into a valid marriage anywhere without a court order. The statute's requirement that all members of the plaintiff class obtain court permission to marry does, in a very concrete way, limit their right to marry in a manner not visited upon all other residents of Wisconsin. Since the classification created by the statute places substantial burdens on the ability of the class members to marry, it affects their fundamental rights and must be subjected to strict scrutiny.

Additionally, the statute places a special burden on some members of the plaintiff class. In Redhail's case, because of his poverty he has been unable to satisfy the support obligation ordered in the paternity action, and, hence, a state court could not grant him permission to marry. Other members of the plaintiff class are barred from obtaining court permission because although they have fulfilled their support obligations, their minor issue are public charges or likely to become such./[5] These members of the plaintiff class would not usually have the financial resources to voluntarily obviate any necessity for governmental aid to their children and to further assure that such aid would not be necessary in the future.

While wealth discrimination alone has not been held by the Court to be an adequate basis for involving strict scrutiny, *San Antonio School District v. Rodriguez*, 411 U.S. 1, 29 (1973), classifications based on wealth have been overturned in the area of voting, see, e.g., *Bullock v. Carter*, 405 U.S. 134 (1972) (primary filing fee requirement); *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (poll tax); criminal procedure, see, e.g., *Douglas v. California*, 372 U.S. 353 (1963) (counsel on direct appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956) (transcripts); and incarceration, *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970). The Court in *Rodriguez* noted at page 20:

> "* * * The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. * * *"

The characteristics identified by the Court in *Rodriguez* are present here with respect to some members of the plaintiff class. Because they lack sufficient financial resources, some of them are unable to fulfill support obligations, while others who have satisified their support obligations lack the

additional wealth required to insure that their minor issue are not public charges nor likely to become such. In both instances, these class members cannot obtain permission to marry. The wealth discrimination inherent in the statute thus provides an additional justification for applying the strict scrutiny test.

Defendant Zablocki and the state have urged that instead of the strict scrutiny test, a more flexible "sliding scale" equal protection approach should be utilized here. See, *Rodriguez*, supra, at 98-110 (Marshall, Jr., dissenting); *Boraas v. Village of Belle Terre*, 476 F. 2d 806 (2d Cir. 1973), reversed, sub nom. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Women's Liberation Union of Rhode Island, Inc. v. Israel*, 379 F. Supp. 44, 49-50 (D.R.I. 1974), aff'd, 512 F. 2d 106 (1st Cir. 1975); *Timberlake v. Kenkel*, 369 F. Supp. 456 (E.D. Wis. 1974) (Reynolds, J.), vacated and remanded, 510 F. 2d 976 (7th Cir. 1975). See generally, Gunther, *The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 Harv. L. Rev. 1 (1972).

There are several reasons, however, why a sliding scale equal protection analysis is not appropriate int his case. First, it is not apparent which contexts require application of the more flexible equal protection approach. Contrast, *San Antonio School District v. Rodriguez*, supra, at 30-31, and *Village of Belle Terre v. Boraas*, supra, with *Jimenz v. Weinberger*, 417 U.S. 628 (1974); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). Moreover, despite the concern voiced by Mr. Justice Marshall in his dissent in *Sosna v. Iowa*, 419 U.S. 393, 418-419 (1975), the opinion of the Court in that case is devoid of language indicating that strict scrutiny is not longer to be applied to classifications which infringe upon fundamental rights, such as marriage, and the result in *Sosna* does not vitiate earlier decisions mandating use of the

strict scrutiny test.[6] Additionally, it is very questionable whether the statute could be upheld by using a sliding scale analysis, since less restrictive means exist by which the governmental interests may be furthered. See, *United States Department of Agriculture v. Moreno*, supra, at 536-537 (1973); *Timberlake v. Kenkel*, supra, at 466-468. The classification created by the challenged statute must, therefore, be measured against the requirements of the strict scrutiny test.

C.

Where a statutory classification is tested against the requirements of the strict scrutiny test —

> "• • • the state bears the burden of showing how compelling its interest may be; depending upon how compelling its interest may be, showing that the specific measure is sufficiently narrowly drawn to achieve the state's interest. Roe v. Wade, 410 U.S. 113, 155, 93 S.Ct. 705, 33 L.Ed. 2d 147 (1973); Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969); *Aptheker v. Secretary of State*, 378 U.S. 500, 508, 84 S.Ct. 1659, 12 L.Ed. 2d 992 (1964)." *Baird v. Lynch*, 390 F. Supp. 740, 749 (W.D. Wis. 1974).

Defendant Zablocki and the state have urged that there are two interests furthered by the statute: (1) providing counseling to the prospective marriage partners emphasizing the necessity of fulfilling pre-existing child support obligations, and (2) protecting the welfare of the children whom members of the plaintiff class are under a court determined obligation to support.[7]

There is some evidence that one of the chief purposes of § 245.10 (1) was to insure that persons who had failed to fulfill support obligations arising from a previous marriage be counseled before they incurred new obligations. See, 28 W.S.A. § 245.10, Legislative Council Notes, 1959, 1975 pocket part, at 36; *Wisconsin Legislative Council — General Report*, Vol. 5, at 68 (1959). The state's interest in such counseling is not, however, of sufficient importance to justify § 245.10 (1).

The statute does not simply provide for mandatory counseling before a second marriage, but prohibits remarriage without court permission which can be granted only if the license applicant has fulfilled support obligations and if the minor children are not public charges or likely to become such. The state's interest in counseling is not, therefore, sufficient to justify the restriction on plaintiff's marital rights because it is not a sufficiently "compelling" state interest and the statute is also not "narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 U.S. 113, 155 (1973).

The second state interest assertedly furthered by the statute — safeguarding the welfare of children — might conceivably be termed both a legitimate and "compelling" governmental interest. It does not, however, justify the restriction on the rights of the plaintiff class imposed by § 245.10 (1), since the statute is not necessary to the achievement of this interest.

Wisconsin law already has several statutory means whereby support obligations may be enforced without restricting the right to marry. If the children are issue of a previous marriage, § 247.232 and § 247.265 give the judge and family court commissioner power to order the parent to make a wage assignment, and under § 295.03 disobedience of a court order to pay child support may be punished as civil contempt without proof of personal demand for payment and refusal to pay. If the support obligation arises through a paternity action, the court can order the parent to execute a wage assignment, § 52.21 (2), order commitment to the county jail, § 52.39, or subject the parent to civil contempt proceedings, § 52.40. Besides these civil remedies, the state may charge a nonsupporting parent with the felony of abandonment of a minor child, § 52.05, or the misdemeanor offense of failure to support a minor child under § 52.055. By adroit use of probation and the Huber law, § 56.08, it can be assured that parents found guilty of these criminal penalties

will comply with their support obligations. These statutory provisions give the state alternative means of enforcing the child support obligations of the plaintiff class members which do not abridge their rights to marry.

Furthermore, for those members of the plaintiff class whose children are public charges, allowing their marriage will have no effect on the children's welfare, since AFDC and other welfare programs will continue to provide support for the children. It is also reasonable to believe that at least some members of the plaintiff class will better their financial circumstances by marriage due to the likelihood of a working spouse./[8]

Application of the strict scrutiny test thus leads inexorably to the conclusion that the challenged statute cannot stand. While it is true that the state has legitimate and substantial interests in regulating the domestic relations of its residents, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), the statute at issue here does not deal with areas such as the age, health, and competency which may be required by legislation of persons desirous of contracting marriage. The inference with the constitutionally protected right to marry caused by the challenged statute cannot withstand close scrutiny, and it therefore runs afoul of the equal protection clause.

For the foregoing reasons,

IT IS ORDERED that the clerk of court enter judgment in favor of the plaintiff Roger G. Redhail and the class he represents, and against defendant Thomas E. Zablocki and the class he represents declaring § 245.10 (1), (4), and (5), Wis. Stats. (1973), unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution and invalid, void, and of no effect.

IT IS FURTHER ORDERED that defendant Thomas E. Zablocki, the class he represents, and their officers, agents, servants, employees, and their successors and those persons in active concert or participation with them who receive

actual notice of the judgment be permanently enjoined from denying applications for marriage licenses on the grounds that the applicant has failed to comply with the provisions of § 245.10 (1), Wis. Stats. (1973).

IT IS FURTHER ORDERED that defendant Thomas E. Zablocki mail a copy of this opinion and order and of the judgment to all members of the class he represents.

Dated at Milwaukee, Wisconsin, this *31st* day of *August*, 1976.

Philip W. Tone
Philip W. Tone,
Judge of the U.S. Court
of Appeals for the
Seventh Circuit

John W. Reynolds
John W. Reynolds,
Chief Judge,
U.S. District Court

Robert W. Warren
Robert W. Warren,
Judge, U.S. District Court

FOOTNOTES

/1 "245.10 Permission of court required for certain marriages. (1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown, and, if the minor issue were of a prior marriage, unless a 5-day notice thereof is given to the family court commisssioner of the county where such permission is sought, who shall attend such hearing, and to the family court commissioner of the court which granted such divorce judgment. If the divorce judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding under s. 52.37 or divorce action of such person in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders

or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting such marriage is filed with said county clerk.

• • • • •

"(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

"(5) This section shall have extraterritorial effect outside the state; and s. 245.04 (1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.

• • • • •"

[2]Companion cases to *Younger* and *Samuels* were: *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971).

[3]There may be members of the plaintiff class who have applied to state courts for permission to marry and whose petitions may be said to be "pending" in those courts. But since the relief requested is prospective in nature and operates against county clerks rather than judges, granting the plaintiff class relief will not occasion "interference" with state court proceedings.

[4a]The Seventh Circuit has stated that in light of n. 14 in *Eisen*, 417 U.S. at 177, the holding in *Schrader* "will presumably have to be reexamined at an appropriate time." *Bijeol v. Benson*, 513 F. 2d 965, 968 n. 3 (7th Cir. 1975).

[4b]Due process requires only that "interested parties" be given notice. *Mullane v. Central Hanover Bank & Trust Co., Trustee*, supra, 339 U.S. at 314. We doubt that the members of the defendant class are interested persons in any realistic sense. While the state cannot involuntarily be made a party because of its sovereign immunity, and the plaintiffs' rights can be asserted only against the agents of the state under the authority of *Ex parte Young*, 209 U.S. 123 (1908), it is the state's interest, not that of the county clerks, that is in reality involved. The state's interest is represented and protected by its chief legal officer, the Attorney General of Wisconsin, who represents the named defendant and who would also be representing the other members of the defendant class whether or not notice is given.

If the suit had been brought against the state (following a valid Eleventh Amendment waiver), only notice to the state itself would have been required, yet the injunction could still have run against the individual county clerks as agents of the state. See Fed. R. Civ. P. 65(d); *Harrington v. Colquitt County Board of Education*, 449 F. 2d 161 (5th Cir. 1971) (*per curiam*). Their interest in the suit is no greater in the instant case, and their due process rights should also be no greater.

[4c]"245.30 Penalties. (1) The following shall be fined not less than $200 nor more than $1,000, or imprisoned not more than one year, or both:

• • • • •

"(f) *Penalty for obtaining license without permission of court.* Any person who obtains a marriage license contrary to or in violation of s. 245.10, whether such license is obtained by misrepresentation or otherwise, or whether such marriage is entered into in this state or elsewhere."

[5]Vernon T. Leipzig, Jr., the plaintiff in the companion case entitled *Leipzig v. Wavro*, C.A. No. 74-C-623, had fully satisfied his child support obligations at the time he petitioned for permission to remarry. Nevertheless, Branch 2 of the County Court, Kenosha County, Wisconsin, denied permission because the four minor children of Leipzig's first marriage were then receiving AFDC benefits.

[6] In *Sosna v. Iowa*, supra, a one-year durational residency requirement for divorce was upheld against attacks based on

the rights to interstate travel and to due process. The substance of the court's approach defies simple characterization, although it did state that the residency requirement "may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience," supra, at 406, and that the plaintiff therein "was not" irretrievably foreclosed from obtaining some part of what she sought." *Id*, at 406. Whether *Sosna* foreshadows a new approach to statutes restricting "fundamental rights" remains uncertain.

/7While in *Beberfall v. Beberfall*, 54 Wis. 2d 329, 195 N.W. 2d 625 (1972), the Wisconsin court stated that the policy behind § 245.10 (1) "is to make certain that the children of the first marriage are not to become public charges," supra at 335, 195 N.W. 2d at 629, the state's interest in saving welfare costs is not a compelling one, *Shapiro v. Thompson*, supra, at 633, and both defendant Zablocki and the state have conceded this. Additionally, there are other statutory tools which the state may use to enforce child support obligations and avoid increased welfare expenses.

/8 As the Court noted in *Taylor v. Louisiana*, 419 U.S. 522, 535 n. 17 (1975), Department of Labor statistics indicate that as of October 1974, 54.2% of all women between ages 18 and 64 were in the labor force.

JUDGMENT (Formal Parts Omitted)

This action came on for (hearing) before the Court, Honorable John W. Reynolds, Phillip W. TonRobert W. Warren, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Section 245.10 (1) (4) and (5), Wisconsin Statutes (1973) is hereby declared unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and is invalid, void and of no effect.

IT IS FURTHER ORDERED: that defendant Thomas E. Zablocki, the class he represents and their officers, agents, servants, employees and their successors and those persons in active concert or participation with them who receive actual notice of this judgment are hereby permanently enjoined from denying applications for marriage licenses on the grounds that the applicant has failed to comply with the provisions of Section 245.10 (1) Wisconsin Statutes (1973).

APPROVED:

Philip W. Tone
Philip W. Tone, U.S. Circuit Judge

John W. Reynolds
John W. Reynolds, Chief U.S. District Judge

Robert W. Warren
Robert W. Warren, U.S. District Judge

Dated at Milwaukee, Wisconsin, this 31st day of August, 1976.

Ruth W. LaFave
Clerk of Court

NOTICE OF APPEAL (Formal parts omitted)

NOTICE IS HEREBY GIVEN that the defendants hereby appeal to the Supreme Court of the United States from the final judgment of the Three-Judge panel of the United States District Court, Eastern District of Wisconsin, entered in this action on August 31, 1976.

This appeal is taken pursuant to 28 U.S.C. sec. 1253.

Dated this *27th* day of October, 1976, at Madison, Wisconsin.

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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all other persons similarly situated,
Appellant,

v.

ROGER G. REDHAIL, individually and on behalf of all other persons similarly situated,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

APPEAL DOCKETED DECEMBER 27, 1976
JURISDICTION NOTED FEBRUARY 22, 1977

APPENDIX

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APPENDIX INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

12/24/74—1	Complaint filed; summons issued.
1/6/75—2	Order of Chief Judge Swygert of the 7th Circuit Ct. of Appeals designating Hon. Phillip W. Tone, Circuit Judge, 7th Circuit, Robert W. Warren and John W. Reynolds as members of the 3 judge court in this case.
1/6/75—3	Marshal's return of service of summons and complaint served on 12/31/74.
1/20/75—4	Pltf's Request for Admission.
1/20/75—5	Answer.
2/6/75—6	Deft's Answers to Pltf's Request for Admissions.
2/18/75—7	Pltfs' Notice of Motion and Motion for entry of an order for Maintainability of a Class Action, with proposed order, supporting affidavit and brief.
2/19/75	Status Conf. (JWR) Cases to be heard together (74-C-623 and 74-C-624). Briefs ordered of the parties.
2/20/75—8	Order following pre-trial conf. held 2/19/75. 74-C-623 and 74-C-624 consolidated for purposes of hearing by the three-judge court. 74-C-624 may proceed as a class action pursuant to Rule 23(b)(2) of the FRCP on behalf of the class of pltfs. defined in the order, etc.

3/3/75—9 Supplemental Memorandum in support of Motion for an order for Maintainability as a Class Action against Deft. Class.

3/6/75—10 Statement of Uncontested Facts, filed by the parties.

3/27/75—11 Brief in Support of Prayer for Final Declaratory and Injunctive Relief.

4/17/75—12 Defts' Brief in opposition to pltfs' prayer for final declaratory and Injunctive relief.

4/23/75—13 Plaintiffs' Reply Brief.

4/29/75—14 Pltfs' Reply to Defts' Brief against Motions for Preliminary Injunction, maintainability of Class Action, and Striking of Jury Demand.

6/11/75—15 Notice of appearance of Steven I. Cohen for Paul Shimek as a member of the pltf. class.

6/11/75—16 Memorandum in Support of Alternative Notice and Application of Paul Shimek.

6/23/75 Oral Argument taken under advisement. (JWR, Tone, RWW)

6/30/75—17 Supplemental Memorandum in Support of Pltfs' Motion for Final Injunctive Relief.

8/31/76—18 Decision (Judges Tone, Reynolds and Warren) directing the Clerk to enter judgment in favor of the pltf. Roger G. Redhail and the class he represents, and against

deft. Thomas E. Zablocki and the class he represents declaring 245.10(1), (4) and (5), Wis. Stats. (1973) unconstitutional under the equal protection clause of the Fourteenth Amendment to the US Constitution and invalid, void and of no effect; further, deft. Thomas E. Zablocki, the class he represents, etc. who receive actual notice of the judgment, be permanently enjoined from denying applications for marriage licenses on the grounds that the applicant has failed to comply with the provisions of 245.10(1), Wis. Stats. (1973).

8/31/76—19 Judgment entered - copy mailed to the parties on 8/31/76.

10/28/76—20 Defts' Notice of Appeal to the Supreme Court of the US from final judgment entered on 8/31/76.

10/28/76 Copy of Notice and docket entries mailed to the US court of Appeals, 7th circuit.

Certificate of Clerk

COMPLAINT. Filed December 24, 1974
[Document No. 1]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

ROGER G. REDHAIL, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-vs-

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all other persons similarly situated,

Defendants.

Case No. 74-C-624

Preliminary Statement

1. This is a civil action. Plaintiff, individually and on behalf of all others similarly situated, seeks declaratory and injunctive relief for violations of his civil rights resulting from the operation of §245.10(1)(4)(5) WIS. STATS. (1971). The statute is challenged on the grounds that it conflicts with the rights secured by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

Jurisdiction

2. Jurisdiction is conferred on this court by 28 U.S.C. §1343. This action is authorized by 42 U.S.C. §1983. Declaratory relief is sought under 28 U.S.C. §2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

Three-Judge Court

3. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§2281 and 2284. Plaintiffs seek an injunction to restrain defendants who are state officers, from the enforcement, operation, and execution of a state statute of statewide applicability on the ground that said statute is contrary to the Constitution of the United States.

Parties

4. Plaintiff, ROGER G. REDHAIL is an adult resident of Wisconsin.

5. Defendant THOMAS E. ZABLOCKI is an adult resident of Wisconsin and is the County Clerk of Milwaukee County and in said capacity is responsible for the issuance of marriage licenses in Milwaukee County.

6. Defendant ZABLOCKI is sued individually and in his official capacity. Relief is also sought against his agents, employees, successors in office, assistants, and all other persons acting in concert or cooperation with the named defendant or at his direction or under his control.

7. Defendant ZABLOCKI has been, is presently, and will continue to act under color of authority and law of the State of Wisconsin in refusing to issue marriage licenses to plaintiffs without an order of the Court.

Class Action
Plaintiffs and Defendants

8. This is a class action brought by ROGER G. REDHAIL on his own behalf and, pursuant to 23(b)(2) Federal Rules of Civil Procedure, on behalf of all persons similarly situated.

9. The members of the class of plaintiffs similarly situated are all Wisconsin residents who have minor issue not in their custody and which they are under an obligation to support by any court order or judgment to whom the county clerk has refused to issue a marriage license without a court order, pursuant to §245.10(1) WIS. STATS. (1971).

10. With respect to the class of plaintiffs, the requirements of Rule 23 of the Federal Rules of Civil Procedure are met in that the class is so numerous that joinder of all members is impracticable (the exact membership of the class is indeterminate); there are questions of law and fact common to the class; the representative plaintiff will fairly and adequately protect the interests of the class; and the parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

11. This is a class action brought against defendant ZABLOCKI individually and, pursuant to Rule 23(b)(2) Federal Rules of Civil Procedure, against all other persons similarly situated.

12. The members of the class of defendants are all county clerks of counties within the State of Wisconsin, all of whom are required by §245.10(1) WIS. STATS. (1971) to refuse to issue marriage licenses to members of the class of plaintiffs without a court order.

13. With respect to the class of defendants, the requirements of Rule 23 of the Federal Rules of Civil Procedure are met in that the class is so numerous that joinder of all members is impracticable, there are questions of law common to the class, the defenses of the representative defendants are typical of the defenses of the class, the representative defendants will fairly and adequately protect the interests of the class, and the plaintiff class opposes the actions of the defendants on grounds generally applicable to the entire class of defendants, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

Factual Allegations

14. In January of 1972, a paternity action was instituted in Milwaukee County against the plaintiff, alleging that he was the father of a baby girl born on July 5, 1970, and that said child was born out of wedlock. (County Court File No. XR-28124).

15. On February 23, 1972, plaintiff, who was then a minor and a high school student, appeared in Milwaukee County Court and admitted that he was the father of said child. The case was then adjourned until May 12, 1972.

16. On May 12, 1972, plaintiff was adjudged to be the father of the baby girl born July 5, 1970; and was ordered to pay $109.00 per month as support for the child until said child reached 18 years of age, and in addition was ordered to pay miscellaneous related expenses.

17. From May of 1972 until August of 1974, plaintiff was unemployed and indigent, and unable to pay any sum for support of his issue; he has in fact made no such payment for support. Plaintiff is informed and believes that the rights to support payments have been assigned to the

Milwaukee County Department of Public Welfare and there is presently an arrearage in the amount of $3,732.

18. Plaintiff is informed and believes that his child is a public charge in that said child receives benefits under the Aid to Families with Dependent Children program; plaintiff is informed and believes that said benefits are in excess of $109 per month.

19. Plaintiff desires to marry. He and the woman he intends to marry are expecting a child to be born to them in early March, 1975, and wish to be lawfully married to one another before their child is born.

20. On September 27, 1974, plaintiff filed an application for a marriage license with defendant ZABLOCKI. On September 30, 1974, an agent of defendant ZABLOCKI informed the plaintiff that defendant ZABLOCKI denied his application for a marriage license and refused to issue a marriage license to plaintiff except upon court order, pursuant to §245.10(1) WIS. STATS. (1971).

21. To obtain a court order requiring defendant ZABLOCKI to issue a marriage license to him, plaintiff must submit proof to the court that he has complied with his prior support obligation and submit proof that his child is not now and is not likely hereafter to become a public charge. Plaintiff is unable to submit proof of compliance with the prior support obligation because he has not in fact complied; he is unable to pay the $3,732 arrears owing to the Milwaukee County Department of Public Welfare, or any substantial part thereof, and will be unable to pay said amount in the foreseeable future. Plaintiff is unable to submit proof that his child is not a public charge because his child is in fact a public charge.

22. Plaintiff is therefore unable to marry in Wisconsin and, because of the provisions of §245.10(4) and (5) WIS. STATS. (1971), plaintiff is unable to contract a valid marriage elsewhere.

23. Upon information and belief, an indeterminate number of Wisconsin residents desire but are unable to contract a valid marriage, either in Wisconsin or elsewhere, because of the provisions of §245.10(1)(4) and (5) WIS. STATS. (1971).

24. Upon information and belief, defendant ZABLOCKI and all members of the class of defendants have refused and will continue to refuse to issue marriage licenses to members of the class of plaintiffs because of the provisions of §245.10(1) WIS. STATS. (1971).

25. Defendant ZABLOCKI, and members of the class of defendants, in refusing to issue marriage licenses to representative plaintiff and members of the class of plaintiffs, are depriving the class of plaintiffs of rights secured by the United States Constitution under color of state law.

Statutes Involved

26. The challenged statute, 245.10(1)(4) and (5) WIS. STATS. (1971), provides as follows:

> "245.10 Permission of court required for certain marriages. (1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court

having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown, and, if the minor issue were of a prior marriage, unless a 5-day notice thereof is given to the family court commissioner of the county where such permission is sought, who shall attend such hearing, and to the family court commissioner of the court which granted such divorce judgment. If the divorce judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding under §52.37 or divorce action of such person in this state affected

thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting such marriage is filed with said county clerk.

(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1).

(5) This section shall have extraterritorial effect outside the state; and §245.04(1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere."

27. §245.30, WIS. STATS. (1971) prescribes the following penalty for violations of 245.10 WIS. STATS.:

"245.30 Penalties (1) The following shall be fined not less than $200 nor more than $1000, or imprisoned not more than one year, or both . . . . . .
(f) Penalty for obtaining license without permission of court. Any person who obtains a marriage license contrary to or in violation of §245.10, whether such license is obtained by misrepresentation or otherwise, or whether such marriage is entered into in this state or elsewhere."

28. §245.05, WIS. STATS. (1971) provides that no person shall be joined in marriage within the state until a marriage license has been obtained from the county clerk. All Wisconsin residents over the age of 18, other than those affected by the challenged statute, 245.10 WIS. STATS. (1971), will be issued a marriage license upon application if they meet the requirements of Chapter 245 WIS. STATS. (1971).

29. Plaintiff and the class he represents have no adequate remedies at law and no adequate administrative remedies to secure their right to marry.

30. Plaintiff and the class he represents have suffered and will continue to suffer irreparable injury unless this Court enjoins defendants from continuing the policies, practices and procedures which deny them the right to be issued a marriage license except upon court order.

First Claim for Relief

31. The acts, conditions and practices alleged in paragraphs 1 - 33 constitute a denial of rights secured to the plaintiffs by the 1st, 5th, 9th and 14th Amendments to the United States Constitution and 42 U.S.C. 1983 in that

they create, and treat differently, two classes of Wisconsin residents who desire to marry:

1. Those who have minor children not in their custody whom they are under an obligation to support.

2. All other persons.

Under 245.10 WIS. STATS., a member of the first class who complies with all other provisions of Chapter 245 of the Wisconsin Statutes relating to the issuance of marriage licenses will nevertheless be denied a license by the county clerk except upon court order. To obtain the court's permission to marry, he must submit proof to the court of his compliance with the prior court obligation to support the minor child or children not in his custody and must show that such children are not then and are not likely to become public charges. Absent such proof he will be denied the right to marry either within or outside Wisconsin. Any marriage, wherever solemnized, which is entered into without the required permission of the court is void. §245.10 WIS. STATS. denies the equal protection of the laws to the plaintiff because it constitutes an unjustifiable interference with, and in many cases denial of, the fundamental right to marry and is not necessary to the achievement of any compelling state interest.

Second Claim for Relief

32. The acts, conditions and practices alleged in paragraphs 1 - 33 constitute a denial of rights secured to the plaintiffs by the 1st, 5th, 9th and 14th Amendments to the United States Constitution and 42 U.S.C. 1893 in that they create, and treat differently, two classes of Wisconsin residents:

1. Those who have minor children not in their custody whom they are under an obligation to support but who lack sufficient means to comply with said obligation and/or to assure that said minors are not then and are not likely to become public charges.

2. All other persons.

Under 245.10 WIS. STATS., a member of the first class who complies with all other provisions of Chapter 245 of the Wisconsin Statutes relating to the issuance of marriage licenses will nevertheless be denied a license by the county clerk except upon court order. To obtain the court's permission to marry, he must submit proof to the court of his compliance with the prior court obligation to support the minor child or children not in his custody and must show that such children are not then and are not likely to become public charges. Absent such proof he will be denied the right to marry either within or outside Wisconsin. Any marriage, wherever solemnized, which is entered into without the required permission of the court is void. §245.10 WIS. STATS. denies the equal protection of the laws to those members of the plaintiff class who, because of their impecunity, are unable to make the requisite showing and who therefore sustain an absolute deprivation of their right to marry based solely upon said impecunity even though said deprivation is not necessary to the achievement of any compelling state interest.

Third Claim for Relief

33. The acts, conditions, and practices alleged in paragraphs 1 - 33 constitute a denial of rights secured to the plaintiffs by the 1st, 5th, 9th, and 14th Amendments to the United States Constitution and 42 U.S.C. 1983 in that the challenged provisions interfere with and/or deny plaintiffs

the right to marry in Wisconsin or elsewhere in order to protect state interests which can be secured by a much less drastic interference with said right thus depriving plaintiffs of substantive due process of law.

Prayer for Relief

WHEREFORE, plaintiff, on his own behalf and on behalf of all others similarly situated, prays that this Honorable Court:

1. Assume jurisdiction of this cause, convene a three-judge court pursuant to 28 U.S.C. §§2281 and 2284 to determine this controversy, and set this case promptly for an expedited hearing;

2. Determine by order, pursuant to Rule 23(c)(I) of the Federal Rules of Civil Procedure, that this action be maintained as a class action;

3. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, declaring that 245.10(1)(4) and (5) WIS. STATS. (1971) are invalid, void and of no effect.

4. Enter a permanent injunction pursuant to 28 U.S.C. §2284 ordering defendants, their successors in office, agents and employees and all other persons in active concert and participation with them to act upon all applications for marriage licenses without regard to the provisions of §245.10(1)(4) and (5) WIS. STATS.

5. Allow plaintiff his costs herein pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, and also grant him and all persons similarly situated such additional or alternative relief as may seem to this Court to be just, proper and equitable;

6. Grant plaintiff reasonable attorneys' fees incurred in this action.

Dated at Milwaukee, Wisconsin, this 24 day of December, 1974.

/s/ Patricia Nelson
Georgia Lutze
Patricia Nelson
Robert H. Blondis
Attorney for Plaintiffs

P.O. ADDRESS

MILWAUKEE LEGAL SERVICES, INC.
Attorneys for Plaintiffs
211 West Kilbourn Avenue
Milwaukee, WI 53203
414/278-7722

ANSWER. Filed January 20, 1975.
[Document No. 5]

[Title omitted in printing.]

The defendant for answer to the complaint alleges:

1. Defendant does not deny or disagree with plaintiffs preliminary statement in paragraph 1 of the complaint.

2. Concedes jurisdiction to the United States District Court, Eastern District of Wisconsin.

3. Concedes that the case is a proper case to be heard by the three judge court.

4. That he is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 4 of the complaint.

5. Defendant admits paragraphs 5, 6, and 7 of the complaint.

6. Defendant denies the allegation of paragraph 8 of the complaint that this action is properly brought as a class action.

7. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint.

8. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the complaint.

9. Defendant denies the allegations in paragraphs 11 and 12 of the complaint.

10. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

11. Admits all the allegations of paragraph 14 of the complaint except that of the date of birth of the child which is actually July 5, 1971.

12. Admits the allegations of paragraph 15 of the complaint.

13. Admits the allegations of paragraph 16 of the complaint.

14. Defendant alleges that he is without knowledge or

information sufficient to form a belief as to the truth of the allegations contained in paragraphs 17, 18, 19, 20, 21, 22, 23, and 24 of the complaint.

15. Defendant denies the allegations of paragraph 25 of the complaint.

16. Defendant admits that paragraphs 26 and 27 constitute accurate transcriptions of Wisconsin Statute 245.10(1)(4) and (5) and 245.30.

17. Defendant admits the allegations of paragraph 28 of the complaint.

18. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 29 of the complaint.

19. Defendant denies the allegations of paragraph 30 of the complaint.

20. Defendant denies the allegations of paragraphs 31, 32, and 33 of the complaint.

WHEREFORE, the defendant prays judgment that the complaint of the plaintiff be dismissed with costs to the defendant.

ROBERT P. RUSSELL
Corporation Counsel

By /s/ David J. Siler
David J. Siler
Assistant Corporation Counsel
Room 303, Courthouse
Milwaukee, Wisconsin 53233

Attorneys for Defendant

Original & 1 copy of ANSWER to:
John W. Reynolds

One copy of ANSWER to:
Patricia Nelson, Legal Services, Inc.
Honorable Philip W. Tone
Honorable Robert W. Warren

One copy of ANSWER & SUMMONS to:
Joseph Salituro

ORDER following pretrial conference.
Filed February 20, 1975.
[Document No. 8]

[Title omitted in printing.]

ORDER FOLLOWING PRETRIAL CONFERENCE
HELD FEBRUARY 19, 1975

At a pretrial conference held on February 19, 1975, Patricia Nelson and Georgia Lutze appearing for plaintiffs and John Devitt and David Siler appearing for defendants in C.A. No. 74-C-624, and Terry Rose appearing for plaintiff and Joseph J. Salituro appearing for defendant in C.A. No. 74-C-623, and Ward Johnson appearing for the Attorney General in both actions, the following orders were entered.

1. The above-entitled actions are consolidated only for purposes of hearing by the three-judge court.

2. The case of *Redhail v. Zablocki*, No. 74-C-624, may proceed as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of the class of plaintiffs defined as follows: all Wisconsin residents who

have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to §245.10(1), Wis. Stats. (1971). Further, in the event that plaintiffs in No. 74-C-624 desire to maintain this action against defendants as a class, they shall file a brief by February 28, 1975, in support of the maintainability of the action as a class action with respect to defendants. Defendants shall file a brief in opposition to the class of defendants by March 14, 1975.

3. Plaintiffs in both actions shall file a statement of uncontested facts with the court by March 5, 1975.

4. Plaintiffs in both actions shall file their briefs with the court by March 26, 1975.

5. Defendants in both actions and the Attorney General shall file their briefs with the court by April 16, 1975.

6. Plaintiffs' reply briefs, if any, shall be filed with the court by April 23, 1975.

Dated at Milwaukee, Wisconsin, this 20th day of February, 1975.

/s/ John Reynolds
U.S. District Judge

STATEMENT OF UNCONTESTED FACTS.
Filed March 6, 1975.
[Document No. 10]

[Title omitted in printing.]

IT IS HEREBY STIPULATED BY AND AMONG THE

PARTIES HERETO through their respective attorneys that the following statement of facts is a true and correct presentation of the events and occurrences which took place concerning the above-entitled case:

1. In January of 1972, a paternity action was instituted in Milwaukee County against plaintiff ROGER G. REDHAIL, alleging that he was the father of a baby girl born on July 5, 1971, and that said child was born out of wedlock (County Court File No. XR-28124). On February 23, 1972, plaintiff REDHAIL appeared in Milwaukee County Court and admitted that he was the father of said child. The case was then adjourned until May 12, 1972.

2. On May 12, 1972, plaintiff REDHAIL was adjudged to be the father of the baby girl born July 5, 1971, and was ordered to pay $109.00 per month as support for the child until said child reaches 18 years of age, and in addition was ordered to pay miscellaneous related expenses. (A copy of said judgment is attached hereto and marked as "Exhibit 1").

3. At the time of his admission of paternity, plaintiff REDHAIL was a minor and a high school student. From May of 1972 until August of 1974, he was unemployed and indigent and unable to pay any sum for support of his issue.

4. Plaintiff REDHAIL has made no payment for support and as of December 24, 1974, there was an arrearage in excess of $3732.

5. The child of plaintiff REDHAIL has been since her birth and is presently a public charge, receiving benefits under the Aid to Families with Dependent Children Program. The benefits received by the child are in excess of $109.00 per month. Said child would be a public charge even if plaintiff REDHAIL were current in the payment of support ordered in the paternity action.

6. Defendant THOMAS E. ZABLOCKI is an adult resident of Wisconsin and is the County Clerk of Milwaukee County and in said capacity is responsible for the issuance of marriage licenses in Milwaukee County, pursuant to §245.05 WIS. STATS. (1971).

7. On September 27, 1974 plaintiff REDHAIL filed an application for a marriage license with THOMAS E. ZABLOCKI.

8. On September 30, 1974, an agent of THOMAS E. ZABLOCKI denied plaintiff REDHAIL's application for a marriage license and refused to issue a marriage license to plaintiff REDHAIL except upon court order, pursuant to §245.10(1) WIS. STATS. (1971).

9. The sole reason for THOMAS E. ZABLOCKI's refusal to issue a marriage license to plaintiff REDHAIL was that plaintiff REDHAIL had failed to comply with §245.10(1) WIS. STATS. (1971).

10. §245.10 WIS. STATS. (1971) provides that a court shall not order a county clerk to issue a marriage license to an applicant who has minor issue not in his custody which he is under obligation to support by any court order or judgment unless such person submits proof that:

A. He has complied with such prior court order of judgment; *and*,

B. That his issue are not now and are not likely hereafter to become public charges.

11. Plaintiff REDHAIL is unable to submit such proof and therefore is unable under the terms of §245.10 WIS. STATS. (1971) to procure an order of the court requiring defendant ZABLOCKI to issue a marriage license to him.

12. There are 72 counties within the State of Wisconsin. Each county has a county clerk with the same statutory powers as defendant ZABLOCKI regarding the issuance of marriage licenses.

13. No county clerk within the State of Wisconsin can lawfully issue a marriage license to plaintiff REDHAIL without the court order required by §245.10 WIS. STATS. (1971).

14. No county clerk within the State of Wisconsin can lawfully issue a marriage license to any person who has minor issue not in his custody which he is under obligation to support by any court order or judgment without the court order required by §245.10 WIS. STATS. (1971).

15. The exact number of persons who have minor issue not in their custody which they are under obligation to support by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order pursuant to §245.10 WIS. STATS. (1971) is indeterminate. Many counties do not keep such statistics, including Dane County. In Milwaukee County alone, in 1974, there were approximately 660 such persons. (Affidavit of Ms. Marion P. Galati, attached to Plaintiff's Memorandum in Support of Motion for an Order for Maintainability of a Class Action, filed 2-14-75).

Dated at Milwaukee, Wisconsin, this 27th day of February, 1975.

/s/ Georgia Lutze
Georgia Lutze
Patricia Nelson
Robert H. Blondis
Attorneys for Plaintiffs

Dated at Milwaukee, Wisconsin this 28th day of February, 1975.

/s/ David J. Siler
Robert P. Russell
Corporation Counsel
By David J. Siler
Assistant Corporation Counsel
Attorneys for Defendants

Dated at _____, Wisconsin this _____ day of _____, 1975

_____
Bronson C. LaFollette
Attorney General
By Ward L. Johnson
Assistant Attorney General

COUNTY COURT
STATE OF WISCONSIN CIVIL DIVISION : COUNTY

STATE OF WISCONSIN, ex rel
DONNA VAN WEELDEN
Complainant,
Plaintiff,
-vs-
ROGER REDHAIL
Defendant.

FINDINGS & JUDGMENT
XR- 28-124
CC- _____

The above entitled matter having come on to be heard before that branch of the above named Court, presided over by the HONORABLE Robert J. Miech, County Judge, on the 12th day of May, 1972; the plaintiff, State of Wisconsin, appearing by Karl M. Dunst, Assistant Corporation Counsel in and for Milwaukee County, Wisconsin; the complainant not appearing in person but

the Court having ordered said action to proceed in her absence under Sec. 52.35 of the Wis. Stats.; the defendant not appearing in person but the Court having ordered said action to proceed in his absence under Sec. 52.34 of the Wis. Stats., but having appeared by his guardian ad litem, John Malinowski; the defendant having heretofore on the 23rd day of February, 1972, entered a written plea admitting that he is the father of the child referred to in the complaint on file herein; proof having been submitted and the Court being fully advised in the premises, now, on motion of Karl M. Dunst, Assistant Corporation Counsel, it is

FOUND AND ADJUDGED

1. That the said complainant on the 5th, day of July, 1971, in the County of Milwaukee, State of Wisconsin, gave birth to a female child, since named Angela; that the child is now alive and being cared for by the complainant residing at 2592 South Burrell Milwaukee County, Wisconsin; that the complainant is not now (and never has been) married, that said child was born out of wedlock, and that by clear and satisfactory evidence, the said defendant is the father of the child delivered of said complainant on the date aforesaid.

1a. That the legal fee to the guardian ad litem appointed for said minor defendant is allowed in the sum of $120.00; and said sum is hereby ordered to be paid to the Chief Deputy Clerk, County Court Civil Division, Milwaukee County, Wisconsin, for the Trustee, in the manner hereinafter set forth in this paragraph; and thereafter paid by such Trustee to said guardian ad litem,

Attorney John Malinowski
5617 West National Avenue
Milwaukee, Wisconsin;

(b) By the Treasurer of Milwaukee County, as an advance payment pursuant to Sec. 328.39, Wis. Stats., the Court being satisfied that the defendant is presently unable to compensate the guardian ad litem adequately for his services and expenses; such sum to be taxes, neverthless, to defendant as an item of costs pursuant to Sec. 271.04(2), Wis. Stats., as amended. Upon payment of such costs said Chief Deputy Clerk, County Court Civil Division is hereby directed to reimburse the Treasurer of Milwaukee County for an advance payment by said Treasurer of such guardian ad litem fee.

2. That the lying-in expenses of said complainant and/or past support of said child, and the fee for complainant's attorney, if any, are allowed in the total sum of $446.00, and the defendant is hereby directed and ordered to pay said sum to the Chief Deputy Clerk, County Court Civil Division, Milwaukee County, Wisconsin, for the Trustee, in the following manner: at the rate of $11.00 per month, commencing as of the first day of July, 1972, and on the first day of each month thereafter until paid; and the said Chief Deputy Clerk is hereby directed and ordered to pay said sum to the following named persons, agencies or institutions in the following order and in the following amounts:

$446.00 to Milwaukee County Department of Public Welfare

3. That the defendant is further ordered to pay and provide for the future support and maintenance of said child by payment of installments of $109.00 per month, commencing as of the first day of July, 1972, until the child shall arrive at the age of eighteen years; that all such payments for the future support be made to the Chief Deputy Clerk, County Court Civil Division, Milwaukee

County, Wisconsin, for the Trustee and by him to the complainant or other person, agency or institution having custody of said child in installments of $109.00 per month, as and for the child's support, the first payment to be made on the 5th day of July, 1972, and on the 5th day of each month thereafter.

4. That the Court orders that from the payments made by the defendant to the said Chief Deputy Clerk, County Court Civil Division either for past or future support, Milwaukee County shall be first reimbursed in the following order: for Court costs, guardian ad litem fees paid by Milwaukee County, and blood test, if any, before any other disbursements are made by the Trustees.

5. That said defendant pay to the Chief Deputy Clerk, County Court Civil Division of Milwaukee County, the costs and disbursements of this action (including costs of blood test, if any herein ordered).

6. In accordance with Sec. 59.42(10)(b) Wis. Stats. on January 1, 1972, and on each and every January 1st thereafter the defendant shall pay to the Chief Deputy Clerk of the County Court Civil Division the sum of $10.00 to cover the cost of handling said trust account. The fee so collected shall be paid to the County Treasurer by the Chief Deputy Clerk of the County Court.

7. The said defendant, Roger Redhail, not having given a bond in accordance with Sec. 52.39 Wis. Stats., be and hereby is committed to the County Jail until he shall comply with and perform such judgment or shall be otherwise discharged according to law; the Court, however, hereby stays execution of such commitment and said execution of the commitment so stayed shall issue at any time when it shall appear to the Court that the defendant has defaulted on any of the provisions of the judgment.

8. The Chief Deputy Clerk, County Court Civil Division, is hereby directed and ordered to file with the State Registrar of Vital Statistics a certified copy of this judgment, with the following information concerning the defendant:

Residence 1348 South 3rd Street Age 18 Color Indian
Birthplace Milwaukee, Wisconsin Occupation Unknown

Dated this 17 day of May, 1972.

Approved:

/s/ Karl M. Dunst
Assistant Corporation Counsel

Date: May 16, 1972

By the Court,

/s/ Robert J. Miech
Judge of County Court Civil Division
of Milwaukee County, Wisconsin

Costs and Disbursements taxed at $153.40 Dollars

Francis X. McCormack, Clerk of Circuit and County Courts

By: _____
Deputy Clerk

DECISION OF THE THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN
Filed August 31, 1976 [Document No. 18]

This decision is printed in the Appendix to the Jurisdictional Statement at pages 1-22.

JUDGMENT ON DECISION BY THE COURT
Filed August 31, 1976 [Document No. 19]

This judgment is printed in the Appendix to the Jurisdictional Statement at page 23.

NOTICE OF APPEAL. Filed October 28, 1976.
[Document No. 24]

The notice of appeal is printed in the Appendix to the Jurisdictional Statement at page 24.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all persons similarly situated,

Appellants,

vs.

ROGER G. REDHAIL, individually and on behalf of all persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION TO AFFIRM

ROBERT H. BLONDIS
Attorney for Appellees

P. O. ADDRESS:

MILWAUKEE LEGAL SERVICES, INC.
211 West Kilbourn Avenue
Milwaukee, Wisconsin 53203
(414) 278-7722

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Appellants,

vs.

ROGER G. REDHAIL, individually and on behalf of all persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the questions are so insubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered on August 31, 1976, by order of a three-judge District Court, declaring Sec. 245.10 (1), (4) and (5), WIS. STATS. (1973) unconstitutional and enjoining its enforcement.

On May 12, 1972, appellee Roger G. Redhail was adjudged by the Milwaukee County Court, Civil Division, to be the father of a child born out of wedlock. He was ordered to pay $109 per month as support until the child reaches eighteen years of age, plus court costs.

At the time of his admission of paternity, Redhail was a minor and a high school student. From May, 1972, until August, 1974, he was unemployed, indigent, and unable to pay any support. He therefore made no payments and as of December 24, 1974, there was an arrearage in excess of $3,732.

Redhail's child has been a public charge since birth and receives AFDC benefits in excess of $109 per month. Therefore, the child would be a public charge even if Redhail were current in his court ordered support payments.

On September 27, 1974, Redhail filed an application for a marriage license with appellant Thomas E. Zablocki. Zablocki is the County Clerk of Milwaukee County and therefore is responsible for the issuance of marriage licenses in Milwaukee County. Sec. 245.05, WIS. STATS. (1973). On September 30, 1974, Redhail was denied a marriage license by an agent of Zablocki solely because he

did not have a court order granting him permission to marry as required by Sec. 245.10 (1), WIS. STATS.

Under Sec. 245.10 (1), WIS. STATS., persons who have minor issue not in their custody which they have been ordered to support may not be issued a marriage license unless a court grants them permission to marry. Permission to marry must be withheld unless the marriage license applicant submits proof that s/he has complied with the support order and that the issue is not likely to become a public charge.[1] Appellee Redhail was unable to submit such proof and therefore could not obtain permission to marry. Redhail did not petition the state court for permission to marry.

The complaint in this action was filed December 24, 1974. The three-judge court was convened pursuant to 28 U.S.C. Sec. 2284 on January 6, 1975. Notice was given to the Governor and the Attorney General as required by 28 U.S.C. Sec. 2284 (2), and the appellant subsequently filed his answer.

On February 18, 1975, appellee filed a motion seeking to have the action maintained as a class action on behalf of all persons subject to the provisions of Sec. 245.10, WIS. STATS., and against a class consisting of all county clerks in the State of Wisconsin. On February 20, 1975, the action was certified as a class action pursuant to Rule 23(b) (2), Federal Rules of Civil Procedure, on

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[1] Section 245.10 (1), (4), and (5), WIS. STATS. are set forth in appellants' Jurisdictional Statement, pp. 3-4.

behalf of the class of appellees.[2] The order of February 20, 1975, also established a briefing schedule on the issue of the certification of the appellant class. Appellees filed a brief in support of the motion; appellant Zablocki did not file a brief in opposition.

A stipulation of facts and briefs on the merits were filed, and oral argument was held on June 23, 1975. On August 31, 1976, the action was certified by the District Court as a class action against the appellant class of county clerks pursuant to Rule 23(b) (2).[3] In the same decision, the District Court declared Sec. 245.10 (1), (4), and (5), WIS. STATS., unconstitutional under the Equal Protection Clause

[2] The appellee class is defined as follows:

"All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to Sec. 245.10 (1), WIS. STATS."

[3] The appellant class is defined as follows:

"All county clerks within the State of Wisconsin, all of whom are required by Sec. 245.10 (1), WIS. STATS., to refuse to issue marriage licenses to the class of plaintiffs without court order."

of the Fourteenth Amendment to the United States Constitution, and enjoined its enforcement by appellant county clerks. Appellant Zablocki was ordered to mail a copy of the opinion, order and judgment to all members of the class he represents.

ARGUMENT

I. THE DISTRICT COURT WAS CLEARLY CORRECT IN HOLDING THAT SEC. 245.10, WIS. STATS. (1973), VIOLATES APPELLEES' RIGHTS TO EQUAL PROTECTION OF THE LAW.

This case does not involve the impact of the equal protection clause on state marriage laws in general. It involves the impact of the equal protection clause on a marriage regulation peculiar to the State of Wisconsin. All states regulate such matters as the age, health, and competency of persons wishing to marry as well as the form essential to create the marriage relation. The decision below does not question the power of the states to do so. The marriage regulation at issue here is quite different. The State of Wisconsin has enacted legislation which divides unmarried, competent, healthy adults into two groups and substantially burdens and often denies the right of one group to marry. The District Court was plainly correct in holding that this particular regulation violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In order for a member of the burdened class to lawfully marry, in Wisconsin or elsewhere,

the statute requires that s/he first obtain a court order granting permission to marry.[4] To obtain such permission, class members are required to make a financial disclosure to the court and to undergo the expense and delay of the statutory procedure.[5] Many class members, including appellee Roger Redhail, are unable to meet the statutory standards for the granting of permission and are therefore completely denied the right to marry.

The District Court subjected this statutory classification to "strict judicial scrutiny" and determined that Sec. 245.10, WIS. STATS., violates the equal protection clause.

Appellants argue that the District Court erred in applying the "strict scrutiny" test rather than the less stringent "rational basis" test. Jurisdictional Statement, pp. 8-9. However, where a

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[4] None of the county clerks in Wisconsin, the appellant class, may issue a marriage license to appellees without a court order. Burdened appellee class members who wish to marry outside the State of Wisconsin must first obtain permission from a Wisconsin court. Sec. 245.10 (4), WIS. STATS. Failure to comply with the requirements of the statute results in a void marriage. Sec. 245.10 (5), WIS. STATS., and criminal penalties, Sec. 245.30 (1) (f), WIS. STATS.

[5] To obtain a court order granting permission to marry, a class member must first file a verified petition with one of several courts. The court then schedules a hearing at which both parties to the proposed marriage must appear. Notice of the hearing must be given to the custodian of the minor

statutory classification interferes with a fundamental right or operates to the disadvantage of a suspect class, this Court's equal protection analysis requires that the strict scrutiny test be applied. Massachusetts Board of Retirement v. Murgia, ____U.S. _____, 96 S. Ct. 2562, 2566, (1976); Roe v. Wade, 410 U.S. 113, 155 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

In decisions spanning over fifty years, this Court has made it clear beyond argument that the right to marry is a fundamental right, one which is encompassed by, and perhaps basic to, the right of personal privacy guaranteed by the United States Constitution. "Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival." Loving v. Virginia, 388 U.S. 1, 12 (1967). See also Roe v. Wade, supra, 410 U.S. at 153; Paul v. Davis, 424 U.S. 693, 712-713 (1976);

(con't footnote 5)

issue. If the minor issue was born of a previous marriage, the family court commissioner of the county where permission is being sought and of the county where the divorce was granted must also be notified. At the hearing, the marriage license applicant must prove compliance with the prior support order and must also prove that the children "are not then and are not likely thereafter to become public charges." The statute gives the court no discretion. If the applicant submits the required proof, permission must be granted; if the applicant is unable to submit such proof, permission must be withheld. Sec. 245.10 (1), WIS. STATS.

United States v. Kras, 409 U.S. 434, 444 (1973); Griswold v. Connecticut, 381 U.S. 479, 486, 495 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).[6] It is apparent that Sec. 245.10, WIS. STATS., seriously interferes with appellees' fundamental right to marry, and therefore the District Court was correct to subject the statute to strict scrutiny.[7]

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[6] Lower courts have also recognized that the right to marry is protected under the Constitution. Keckeisen v. Independent School District 612, 509 F.2d 1062, 1065 (8th Cir. 1975), cert. denied, 423 U.S. 833, (1975); Pederson v. Burton, 400 F. Supp. 960, 962 (D.D.C. 1975); O'Neill v. Dent, 364 F. Supp. 565, 568-569 (E.D. N.Y. 1973); Holt v. Shelton, 341 F. Supp. 821, 822-823 (M.D. Tenn. 1972).

[7] As the District Court pointed out, the wealth discrimination inherent in the statute provides an additional justification for applying the strict scrutiny test. Although wealth discrimination alone is not a sufficient basis for applying strict scrutiny, classifications based on wealth have been strictly scrutinized and overturned in cases where the persons constituting the class discriminated against were, because of their poverty, completely unable to pay for a benefit and as a result were absolutely deprived of any opportunity to enjoy that benefit. See San Antonio School District v. Rodriquez, 411 U.S. 1, 20-22 (1973). The cases cited by the Court in Rodriguez share one other distinguishing factor: the benefits denied to indigent persons were extremely important in nature. See e.g., Griffin v. Illinois, 351 U.S. 12 (1956); Bullock v. Carter, 405 U.S. 134 (1972); Tate v. Short, 401 U.S. 395 (1971).
(footnote cont'd on next page)

The strict scrutiny test is demanding; the state bears the burden of showing that the statutory classification is necessary to promote a compelling state interest and that the statute is "narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, supra, 410 U.S. at 155. Appellants argued in the District Court that two state interests are promoted by the statute: providing counseling to emphasize the need to meet current support obligations, and protecting the welfare of those children which appellees have been ordered to support. It is apparent that neither state interest is sufficient to justify the statutory restriction on appellees' rights to marry[8] and appellants do not dispute this conclusion in their Jurisdictional Statement.

In fact, the statutory classification involved here could not be upheld under the less stringent rational relationship standard because it is not fairly and substantially related to any legitimate, articulated state purpose. San Antonio School District v. Rodriguez, supra, 411 U.S. at 17;

(con't footnote 7)

All these characteristics are present with respect to Redhail and many other members of the appellee class who are unable to prove both compliance with the prior support order and that their children are not public charges. Because of their poverty, they are completely unable to enjoy the benefit of marriage, a benefit of unquestioned importance to which no satisfactory alternative is possible.

[8] Appendix of the Jurisdictional Statement, (hereafter "Ap."), pp. 15-17.

Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Assuming arguendo that the State has a legitimate interest in providing counseling before marriage to persons with pre-existing support obligations, Sec. 245.10, WIS. STATS., does not require that appellees submit to counseling nor does it require the court hearing the petition for permission to marry to counsel the petitioner regarding his/her support obligations. The statutory requirements are limited to an examination of the petitioner's compliance with the support order and of his/her ability to provide enough support to prevent the children from becoming public charges. Indeed, the statute allows the court to waive the hearing if it is satisfied from court records, family support records, and the petitioner's financial disclosure that the statutory requirements are met. Since the hearing offers the only opportunity for counseling the marriage license applicant, allowing waiver of the hearing entirely defeats the state purpose allegedly promoted by the statute.

Nor does the statute rationally further the other purpose identified by the State, the protection of the welfare of children. The children of those persons who are granted permission to marry are simply not affected by the procedure their parents have been forced to undergo. Children of persons who are denied permission to marry, whether because the parent is behind in support payments or because the children are public charges, are also unaffected by the procedure. If permission to marry is denied, the back support will still be owing; the child will still receive public assistance. In order

to collect the unpaid support or to increase the amount of the support order, the child's custodian or the State must still resort to the statutory tools available under Wisconsin law.[9]

It might be argued that Sec. 245.10, WIS. STATS., promotes the welfare of children by preventing appellees from taking on new financial obligations through marriage. However, as the District Court pointed out, it is likely that many persons in the appellee class will improve their financial situation through marriage because their new spouse will be employed. Ap. 17. Furthermore, many people have children without benefit of marriage and are, of course, obligated to support those out-of-wedlock children. Often the only result of the statute is to deny expectant parents the right to marry and legitimate their child.[10] Far from promoting the welfare of children, the statute thus results in the unnecessary illegitimacy of children whose parents want very much to marry.

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[9]The lower court outlined the statutory means for enforcing support obligations at Ap. 16-17. In addition, both divorce courts and paternity courts are authorized to increase support orders as the circumstances of the parent allow. Sec. 247.25, WIS. STATS. (1973); Sec. 52.38, WIS. STATS. (1973).

[10]Appellee Redhail alleged in his complaint that he and the woman he wanted to marry were expecting a child. Complaint, Para. 19.

In summary, whatever standard is applied, Sec. 245.10, WIS. STATS., violates appellees' rights to equal protection of the law.[11]

II. THIS IS NOT A PROPER CASE FOR ABSTENTION.

Appellants argue that federal courts should abstain in the area of domestic relations, at least in cases where the state court has not had the opportunity to decide the question of the constitutionality of the statute. In support, appellants cite Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); and Reetz v. Bozanich, 397 U.S. 82 (1970).

This Court has recently emphasized that abstention is an exception to the general rule that a federal court is obligated to adjudicate a controversy properly before it. Ex. Bd. of Eng., Arch., & Sur. v. Flores de Otero, _____U.S._____, 96 S.Ct. 2264, 2279 (1976); Colorado River Water Conser. Dist. v. U.S., 424 U.S. 800, 813-817 (1976).

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[11]Appellants urged the District Court to apply the "sliding scale" or "middle tier" equal protection approach. This standard requires that the statutory classification serve important governmental objectives and be substantially related to the achievement of those objectives. See, e.g., Reed v. Reed, 404 U.S. 71 (1971); Craig v. Boren, 45 U.S.L.W. 4057 (dec'd. 12/20/76). This court has not applied the middle tier test to classifications involving fundamental rights such as marriage and the District Court rejected it. Ap. 14. However, the District Court did point out that it is questionable whether the statute could be upheld using this analysis.
(footnote cont'd on page 12)

Abstention is appropriate in cases involving unsettled questions of state law, the resolution of which may make decision of the federal constitutional claim unnecessary, Lake Carriers Ass'n v. MacMullen, 406 U.S. 498 (1972), or is for some reason peculiarly within the province of state courts, Reetz v. Bozanich, supra. However, this case presents no unsettled question of state law. The statute is plain and unambiguous and appellants do not claim otherwise. "Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971). See also Zwickler v. Koota, 389 U.S. 241, 245-252 (1967).

Abstention is also appropriate in many cases where the exercise of federal jurisdiction would interfere with a pending state court action. Younger v. Harris, supra; Huffman v. Pursue, Ltd., supra. This doctrine of abstention is based on, "principles of equity, comity and federalism [which] 'have little force in the absence of a pending state proceeding.' " Steffel v. Thompson, 415 U.S. 452, 462 (1974). Younger and Huffman do not bar consideration of the merits of this case because no state proceeding is or ever has been pending.

Appellants also appear to propose that this Court require appellees to attempt to vindicate their claim in state court simply because the claim involves the regulation of marriage. This is a

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(cont'd footnote 11)

Ap. 15. The classification is not substantially related to the achievement of any important governmental objective since there are numerous less restrictive means by which the interests involved can be furthered.

rather novel argument for which appellants cite no authority. Appellants are clearly correct in asserting that the regulation of marriage is purely a state function, but the state's power in the area of domestic relations, as in other areas, is limited by the Fourteenth Amendment. Loving v. Virginia, supra, 388 U.S. at 7. Congress has given the federal courts both the power and the duty to protect federal constitutional rights. Steffel v. Thompson, supra, 415 U.S. at 472. There is no reason, either in law or in logic, to exclude the important rights involved in marriage from this protection.

III. DUE PROCESS DOES NOT REQUIRE NOTICE TO MEMBERS OF A RULE 23(b) (2) CLASS.

The final issue raised by appellants is whether due process requires that notice be given to members of a class if the judgment is to be binding upon them. The District Court certified this action as a class action on behalf of the appellee class and against the appellant class under Rule 23(b) (2) of the Federal Rules of Civil Procedure, and held that no prejudgment notice to either class was required.

Rule 23 does not by its terms require notice to all members of a (b) (2) class. Rule 23(d) (2), gives the court the authority to make orders for the protection of the class as fairness requires, including the authority to require notice to absent class members.

Although a split of authority did exist on the question of whether due process requires notice to absent members of a (b) (2) class in all cases, Ap. 7, recent decisions of this Court and the circuit courts have substantially resolved the issue.

In Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974), this Court discussed the notice requirements of Rule 23(c) (2) in Rule 23(b) (3) class actions. Although due process standards were discussed, this Court's decision that individual notice must be sent, at plaintiff's expense, to all identifiable class members was firmly based on the language and history of Rule 23 itself. Id. at 173-179. The Court also limited its decision to actions brought under Rule 23(b) (3), expressly excluding (b) (2) actions. Id. at 177, n. 14.

Sosna v. Iowa, 419 U.S. 393 (1975), involved a (b) (2) class action. This Court did not require notice to absent class members, stating that the problems associated with (b) (3) actions and considered in Eisen were not present. Id. at 397, n. 4. The Court later pointed out that all class members would be bound by the judgment. Id. at 403. Eisen and Sosna, read together, require the conclusion that this Court does not intend to impose a blanket requirement of notice to absent class members in all types of representative actions.

A number of circuit courts have held that, in light of Eisen and Sosna, notice is not required in class actions brought under (b) (1) and (b) (2). Frost v. Weinberger, 515 F. 2d 57, 65 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 254-257 (3rd Cir. 1975), cert. denied, 421 U.S. 1011 (1975); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 878-879 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); Molina v. Weinberger, No. 74-1611 (9th Cir. Oct. 1, 1975), Slip Opinion 11-14; Larinoff v. United States, 533

F.2d 1167, 1184-87 (D.C. Cir. 1976)[12]
The Seventh Circuit, which held in Schrader v. Selective Service System Local Board No. 76, 470 F.2d 73, 75 (7th Cir.) cert. denied, 409 U.S. 1085 (1972), that notice is required in all representative actions, has questioned this decision in light of Eisen. Bijeol v. Benson, 513 F.2d 965, 968 n. 3 (7th Cir. 1975). The Sixth Circuit now stands alone in stating that due process does require notice to class members in all representative proceedings. Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972). And the validity of the Zeilstra decision is at best unclear. Because the Court decided that the District Court lacked subject matter jurisdiction, this statement was clearly dictum and is not uniformly followed by district courts within the Sixth Circuit. See e.g., Watson v. Branch County Bank, 380 F. Supp. 945, 956-960 (W.D. Mich., S.D. 1974). Appellees are not aware of any reported cases in which the Sixth Circuit re-examined or reaffirmed this position. And the Sixth Circuit relied in Zeilstra upon the now questioned Seventh Circuit decision in Schrader v. Selective Service System Local Board No. 76, supra,

[12]See also Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972) and Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975), rev'd on other grounds, 45 U.S.L.W. 4031 (dec'd. 12/7/76), which hold that notice is not required in (b) (2) class actions based on the language of Rule 23 and Ryan v. Shea, 525 F.2d 268, 275 (10th Cir. 1975), which discusses the issue but does not decide it.

and on the Second Circuit's decision in Eisen v. Carlisle and Jacquelin, 391 F.2d 555, 564-565 (2d Cir. 1968), on remand, 52 F.R.D. 253 (S.D. N.Y. 19710, 54 F.R.D. 565 (S.D. N.Y. 1972) rev'd. 479 F.2d 1005 (2d Cir. 1973), vacated, 417 U.S. 156 (1974). However, the Second Circuit held in Frost v. Weinberger, supra, that its statement with regard to notice in Eisen does not apply to (b) (2) actions.

In light of the above authority, it is clear that the District Court was correct in holding that due process does not require notice to (b) (2) class members in all cases. Moreover, the District Court was correct in finding that no special circumstances existed in this case which required notice to members of either class under Rule 23(d) (2), The District Court found that the representation of the interests of both classes was fair and adequate and especially noted the participation of the Attorney General of Wisconsin as an important element in protecting the interests of the defendant class of county clerks. The Court specifically found intervention by members of either class to be unnecessary. Ap. 6, 9. These findings are clearly correct and appellants do not appear to dispute them. Therefore, the District Court's decision on the class issues should be affirmed.

IV. THIS COURT SHOULD SUMMARILY AFFIRM THE JUDGMENT OF THE DISTRICT COURT.

This appeal presents no questions substantial enough to warrant further review by this Court. The abstention issue raised by appellants is without merit. Sec. II, supra. The issue of notice to (b) (2)

class members, although formerly a subject of controversy among the circuits, has now been resolved. Sec. III, supra. On the merits of the constitutional claim, the District Court did no more than apply well-established equal protection analysis to a statutory classification which unquestionably conflicts with a fundamental, constitutionally protected right. Sec. I, supra. Appellants do not cite nor are appellees aware of any decisions of this Court or of lower federal courts which conflict with the judgment of the District Court in this case.

Furthermore, the merits of the constitutional claim involve a statute which is peculiar to the State of Wisconsin. To appellees' knowledge, no other state has enacted legislation similar to Sec. 245.10, WIS. STATS. (1973). Therefore, this appeal does not affect in any way the rights of persons who are not before the Court, nor will summary affirmance deprive lower federal courts of guidance in similar cases.

CONCLUSION

For the foregoing reasons, appellees respectfully move this Court to summarily affirm the judgment of the District Court.

Respectfully submitted,

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January 20, 1977

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all other persons similarly situated,
Appellant,

v.

ROGER G. REDHAIL, individually and on behalf of all other persons similarly situated,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANT

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IN THE

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ROGER G. REDHAIL, individually and on behalf of all other persons similarly situated,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANT

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin is reported as *Redhail v. Zablocki*, 418 F. Supp. 1061 (1976), and is included in the appendix to the jurisdictional statement at page 1.

JURISDICTION

This is an action for declaratory and injunctive relief brought under the Civil Rights Act, 42 U.S.C. §1983, by the appellee as an individual and on behalf of all persons similarly situated against the named defendant who is the Milwaukee County clerk and against all such persons similarly situated. Jurisdiction of the district court was invoked under 28 U.S.C. §1343(3). A three-judge district court was convened and a final order of that court granting declaratory and injunctive relief was entered on August 31, 1976.

The statutory provision conferring jurisdiction on this court to review the judgment by direct appeal is 28 U.S.C. §1253.

Cases sustaining the jurisdiction of the court to hear the appeal are *Goldstein v. Cox*, 396 U.S. 471 (1970), and *Wyman v. Rothstein*, 398 U.S. 275 (1970).

CONSTITUTIONAL PROVISION INVOLVED

Article XIV, Section 1, Amendments to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

WISCONSIN STATUTE INVOLVED

Section 245.10(1), (4) and (5), Wis. Stats.

> "**245.10 Permission of court required for certain marriages.** (1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown, and, if the minor issue were of a prior marriage, unless a 5-day notice thereof is given to the family court commissioner of the county where such permission is sought, who shall attend such

hearing, and to the family court commissioner of the court which granted such divorce judgment. If the divorce judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding under s. 52.37 or divorce action of such person in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting such marriage is filed with said county clerk.

* * *

(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

(5) This section shall have extraterritorial effect outside the state; and s. 245.04(1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere."

QUESTIONS PRESENTED

1. Is a state statute which requires a marriage applicant, having minor issue not in his custody and which he is under an obligation to support, to show to a court that such issue was not then or likely thereafter to become a public charge violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Answered by the three-judge court in the affirmative.

2. Where a state has legitimate and substantial interests in regulating domestic relations of its residents, should the abstention doctrine be applied requiring the dismissal of the complaint filed in a federal district court?

Not answered by the three-judge court.

3. Does due process require a notice to members of a class if the judgment is to be binding upon them?

Answered by the three-judge court in the negative.

STATEMENT OF FACTS

In January of 1972, a paternity action was commenced in the County Court, Civil Division, of Milwaukee County, Wisconsin, against appellee Roger G. Redhail in which it was alleged that he was the father of a baby girl born out of wedlock on July 5, 1971. On February 23, 1972, Redhail appeared and admitted that he was the father of the child. On May 12, 1972, Redhail was adjudged the father of the child born on July 5, 1971, and was ordered to pay $109 per month as support for the child until she reached eighteen years of age, and was also ordered to pay court costs.

At the time of his admission of paternity, Redhail was a minor and a high school student. From May of 1972 until August of 1974, he was unemployed, indigent, and unable to pay any support obligation. No payments were, therefore, made, and as of December 24, 1974, there was an arrearage in excess of $3,732.

Redhail's child has been a public charge since her birth and is currently receiving benefits under the Aid to Families with Dependent Children ("AFDC") program in excess of $109 per month.

On September 27, 1974, Redhail filed an application for a marriage license with appellant Thomas E. Zablocki. Zablocki is the County Clerk of Milwaukee County and is responsible for the issuance of marriage licenses in Milwaukee County pursuant to §245.05, Wis. Stats. On September 30, 1974, an agent of Zablocki denied Redhail's application for a marriage license and refused to issue a marriage license because Redhail failed to comply with §245.10(1), Wis. Stats., in that he did not have a court order granting him permission to marry.

The complaint in this action was filed on December 24, 1974. Since a permanent injunction restraining the enforcement of a state statute was requested, the action was one requiring a three-judge district court, 28 U.S.C. §2281. Designation of a three-judge court was requested, and on January 6, 1975, the Chief Judge of the Seventh Circuit entered an order designating this three-judge court pursuant to 28 U.S.C. §2284. Appellant subsequently filed his answer. Notice was given to the governor and the attorney general pursuant to 28 U.S.C. §2284(2).

On February 18, 1975, appellee filed a motion for a class action. The motion sought to have the action maintained as a class action on behalf of all Wisconsin residents subject to the provisions of §245.10(1) and against a class consisting of all the county clerks within Wisconsin. By order dated February 20, 1975, Judge Reynolds ordered that the action proceed as a class action pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, on behalf of a class of plaintiffs defined as follows:

> "All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to §245.10(1), Wis. Stats. (1971)."

The members of the appellant class of county clerks were never given notice of the pendency of the action. No notice, either individual or otherwise, was directed at the appellee class in this proceeding (Jurisdictional Statement, Appendix, Page 7).

SUMMARY OF ARGUMENT

The three-judge court of the United States District Court of the Eastern District of Wisconsin extended and applied the compelling governmental interest test articulated in *Shapiro* to a statutory marriage requirement. In absence of racial classification or invasion of marital privacy, application of this stringent test is not justified lest marriage restrictions as to age or having another spouse are to be held violative of equal protection. *Sousna* has declared the area of domestic relations to be traditionally within the scope of state regulation.

Because of *Sousna*, the district court should have stayed its hand under the abstention doctrine developed in *Reetz* and *Pursue* in absence of a compelling reason to accept jurisdiction over a case involving marriage or domestic relations.

The district court erred in not requiring notice to be sent to the defendant class before its decision as mandated by *Eisen*.

ARGUMENT

I. The Classification Created By Sec. 245.10(1), Wis. Stats., Complies With The Requirements Of Equal Protection.

A. Eligibility requirements for marriage should be viewed in the light of a reasonable relationship test.

This court has consistently indicated that domestic relations have always been subject to control of the state legislature. In *Maynard v. Hill*, 125 U.S. 190, 205 (1888), the court observed:

> "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure of form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution."

In *Sousna v. Iowa*, 419 U.S. 393, 404 (1975), the court stated:

> "The durational residency requirement under attack in this case is a part of Iowa's comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact. In Barber v. Barber, 21 How. 582, 584, 16 L. Ed. 226 (1859), the Court said: 'We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce . . . .' In Pennoyer v. Neff, 95 U.S. 714, 734-735, 24 L. Ed. 565 (1878), the Court said: 'The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved,' and the same view was reaffirmed in Simms v. Simms, 175 U.S. 162, 167, 20 S. Ct. 58, 60, 44 L. Ed. 115 (1899)."

In view of the foregoing judicial backdrop expressed in the *Maynard* and *Sousna* cases, *supra*, it is submitted that application of equal protection to a statutory classification should be measured by the traditional reasonable relationship test. As stated in *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 214, 215 (1920):

> "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Section 245.10, Wis. Stats., was part of the revision of the Family Code introduced by the Wisconsin Legislative Council in the form of Bill No. 151A and enacted into law by the 1959 Legislature. Extensive notes were imprinted upon the bill which were before the Legislature in its deliberations. Note fourteen following proposed sec. 245.10 states: "This new provision is designed to cover a situation where a person who is about to assume new marital responsibilities has failed to fulfill the obligation of a prior marriage. In such a case judicial approval must be attained. This gives the judge and the family court commissioner an opportunity to emphasize the responsibility of support of the present family before new obligations are incurred."

This statute was expanded in 1963 to require a showing by a marriage applicant to a court that his minor children who are not in his custody and to whom he owes an obligation of support are not public charges or likely to become public charges. In determining that this statute does not have an extraterritorial effect, the Wisconsin Supreme Court in *State v. Mueller*, 44 Wis. 2d 387, 395, 171 N.W. 2d 414 (1969), noted:

> ". . . . the interest Wisconsin seeks to protect is a legitimate and substantial protectable interest of this state both as to the protection of the welfare of its minors and the marriage relationship of its residents . . ."

It should be apparent that the principal governmental interest is in the welfare of children of a marriage applicant, that provision for such children should be accommodated before new marital obligations are undertaken.

While Wisconsin residents who have minor children not in their custody whom they are under an obligation to support are under a burden in obtaining a marriage license, there is a rational reason for the classification. As stated by the court in *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961):

> "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . ."

B. The three-judge court erred in applying a compelling interest standard.

1. Characterization of marriage as a fundamental right should not invoke the compelling interest test.

In its decision, the three-judge court found that the classification of sec. 245.10, Wis. Stats., placed a substantial burden on the ability of persons in the

appellee's class to marry. The court reasoned that since a fundamental right was involved, the classification was subject to strict scrutiny requiring the showing of a compelling governmental interest.

There has been only one case before this court involving marriage eligibility requirements. That case involved a prohibition of intermarriage between whites and non-whites. *Loving v. Virginia*, 388 U.S. 1 (1967). Because the miscegenation statute in question rested solely upon distinctions drawn according to race, the case is not particularly helpful with the respect to the matter *sub judice*. The compelling state interest requirement had not yet emerged.

The "compelling interest" doctrine was articulated more explicitly than ever before in *Shapiro v. Thompson*, 394 U.S. 618 (1969). It should not be extended to the domestic relations field. In commenting that a classification which affects a fundamental right can only be justified by the compelling interest test, Justice Harlan's dissent in *Shaprio, supra*, 394 U.S. 661-662 is instructive:

> "I think this branch of the 'compelling interest' doctrine particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights. This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental matters as the right to pursue a particular occupation, the right to receive greater or smaller wages or to work more or less hours, and the right to inherit property. Rights such

as these are in principle indistinguishable from those involved here, and to extend the 'compelling interest' rule to all cases in which such rights are affected would go far toward making this Court a 'super-legislature.' This branch of the doctrine is also unnecessary. When the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test."

There can be no doubt that the compelling interest test is a result-oriented concept. What asserted interests are compelling enough in any marriage requirement? Traditionally, states have established requirements relating to age, blood tests, competency, solemnization and fees. States have traditionally prohibited marriage between next-of-kin or by a person already having a spouse. It is submitted that all or any of such requirements could be struck down as violative of equal protection if the compelling interest test of the *Shapiro* case were to be extended. It is significant that this court did not extend the Shapiro doctrine in upholding Iowa's one-year durational residency requirement for divorce in the *Sousna* case, *supra*.

2. The classification created by sec. 245.10, Wis. Stats., does not involve suspect criteria so as to invoke the compelling interest test.

The three-judge court erred in assuming that sec. 245.10, Wis. Stats., created a classification based on wealth. On its face, sec. 245.10, Wis. Stats., does not create any classification based on wealth. It applies generally to rich and poor alike. That it may affect persons differently does not constitute invidious discrimination. Such a result flows directly from the economic system, not the law. The law merely withholds issuance of a license to remarry until a showing that obligations incurred from the first marriage are met. The state's substantial interest in protecting the children of non-custodial parents provides more than a reasonable basis for the statutory classification involved. The district court's application of the strict scrutiny test under the circumstances of this case ignores the traditional standard for applying equal protection in cases involving social and economic regulation under *San Antonio Ind. School District v. Rodriguez*, 414 U.S. 1 (1973) and in *Dandridge v. Williams*, 397 U.S. 471 (1970).

It would be rigid sophistry to view the case at bar as involving simply the right to marry in the abstract. It is the right to marry where the applicant already has minor children to support. The right to marry per se is not involved. The state's interest in the children of the applicant is correspondingly stronger than it would be if the right to marriage were simply involved. It is the interest in the children of a marriage applicant that must be measured against his interest in marriage or remarriage. While the Equal Protection Clause prohibits states from discriminating between rich and poor as such in the formulation and application of their laws, it is a far

different thing to suggest that equal protection prevents a state from adopting a law of general applicability that may affect poor persons differently than it does those who are more wealthy. ". . . At least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *San Antonio Ind. School District v. Rodriguez, supra*, 414 U.S. 24. "Ability to pay should not be confused with opportunity to pay." *Llamas v. Department of Transportation*, 320 F. Supp. 1041, 1044 (E.D. Wis. 1969).

II. The Court Below Should Have Abstained.

Even though a federal equity court has jurisdiction of a particular proceeding, it may, in its sound discretion, refuse to enforce or protect legal rights where the exercise may be prejudicial to the public interest as a proper regard for the independence of state governments in carrying out their domestic policy. *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-318 (1943). Abstention has been deemed to be proper in a Civil Rights case. *Harrison v. NAACP*, 360 U.S. 167 (1959).

The doctrine of federalism set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and extended to civil proceedings in *Huffman v. Pursue*, 420 U.S. 592 (1975), was not considered by the district court in the case at bar. There are probably as many different marriage requirements as there are states. The regulation of marriage is, of course, purely a state function. As evidence of the limitation of the federal judiciary to survey state statute books under the Fourteenth Amendment, one need look no further than the *Younger* doctrine. There is a correlative principle implicit in the federal-state relationship applicable to the instant case. Under *Reetz v. Bozanich*, 397 U.S. 82 (1970), it was announced that a federal court, in the interest of comity should stay its hand where the issue of

state law is constitutionally uncertain, and where no opportunity had been afforded to state courts for review. Accordingly, it is suggested that the district court should have required the appellee to repair to the state court in the traditional state area of marriage regulation and in view of the fact that a Wisconsin state court has had no opportunity to decide the question of the constitutionality of sec. 245.10, Wis. Stats. In this connection, the Wisconsin Supreme Court in *State v. Mueller, supra*, carefully noted:

> "There is no claim here that the statutes violate any specific provision of the United States Constitution or the Wisconsin Constitution, only that Wisconsin cannot constitutionally regulate or punish for acts done outside its territorial boundaries." 44 Wis. 2d 391.

Because there is nothing patently unconstitutional about sec. 245.10, Wis. Stats., on its face, see *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the abstention doctrine should have been applied to this case in light of *Sousna v. Iowa, supra.*

III. The Three-Judge Court Erred In Establishing A Defendant Class Without Requiring A Notice To Members Of Such Class.

This action was commenced on behalf of a plaintiff as a class action. It also named a county clerk as a defendant and all other persons similarly situated. There are 72 counties and clerks thereof in the state of Wisconsin (1975 Bluebook, pages 664-665). No notice was required by the court nor was any notice ever given to members of this class prior to the decision of the three-judge court. After its decision, the court ordered:

"That defendant Thomas E. Zablocki, the class he represents and their officers, agents, servants, employes and their successors and those persons in act of concert or participation with them who receive actual notice of this judgment are hereby permanently enjoined from denying applications for marriage licenses on the grounds that the applicant has failed to comply with the provisions of sec. 245.10(1), Wisconsin Statutes (1973).

"IT IS FURTHER ORDERED that defendant Thomas E. Zablocki mail a copy of this opinion and order of the judgment to all members of the class he represents." (Jurisdictional Statement, Appendix, pages 17-18.)

It is submitted that the granting of declaratory and injunctive relief against the class violates the mandatory requirements of Rule 23(c)(2), requiring that:

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort . . ."

In *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173-179 (1974), this court clearly required that individual notices be sent, at plaintiff's expense, to all identifiable class members. There was no onerous burden involved in advising 72 county clerks of this action before the decision was made. The class is not so numerous as to preclude such notice. The members of this class are easily identifiable. It

is submitted that due process requires such notice if the judgment is to be binding upon them in light of *Eisen v. Carlisle and Jacquelin, supra.*

CONCLUSION

"Some measure of judicial restraint is the price of preserving the tripartite form of government of our democratic republic." *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 564, 185 N.W. 2d 306 (1971).

Appellant respectfully urges that the judgment of the United States District Court for the Eastern District of Wisconsin be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all persons similarly situated,

Appellants,

vs.

ROGER G. REDHAIL, individually and on behalf of all persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLEES

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLEES

QUESTIONS PRESENTED

I. Should the Court have refused to exercise jurisdiction in this case under the abstention doctrine?

II. Does WIS. STAT. sec. 245.10 violate the right of plaintiffs to equal protection of the law?

III. Does WIS. STAT. sec. 245.10 violate the right of plaintiffs to due process of law?

IV. Was the District Court correct in holding that notice was not required for absent defendant class members?

STATEMENT OF THE CASE

This is a direct appeal from the final judgment and decree entered on August 31, 1976, by order of a three-judge District Court, declaring WIS. STAT. sec. 245.10(1), (4) and (5) (1973) unconstitutional and enjoining its enforcement.

On May 12, 1972, appellee Roger G. Redhail was adjudged by the Milwaukee County Court, Civil Division, to be the father of a child born out of wedlock. He was ordered to pay $109 per month as support until the child reaches eighteen years of age, plus court costs. (A. 21).

At the time of his admission of paternity, Redhail was a minor and a high school student. From May, 1972, until August, 1974, he was unemployed, indigent, and unable to pay any support. He therefore made no payments and as of December 24, 1974, there was an arrearage in excess of $3,732. (A. 21).

Redhail's child has been a public charge since birth and receives welfare benefits in excess of $109 per month. Therefore, the child would be a public charge even if Redhail were current in his court ordered support payments. (A. 21).

On September 27, 1974, Redhail filed an application for a marriage license with appellant Thomas E. Zablocki. Zablocki is the County Clerk of Milwaukee County and therefore is responsible for the issuance of marriage licenses in Milwaukee County. WIS STAT. sec. 245.05 (1975). On September 30, 1974, Redhail was denied a marriage license by an agent of Zablocki solely because he

did not have a court order granting him permission to marry as required by sec. 245.10(1). (A. 22).

Under sec. 245.10(1), persons who have minor issue not in their custody which they have been ordered to support may not be issued a marriage license unless a court grants them permission to marry. Permission to marry must be withheld unless the marriage license applicant submits proof that she or he has complied with the support order and the issue is not likely to become a public charge. (A.22). WIS. STAT. sec. 245.10(1), (4) and (5) are set forth in the Brief of Appellant, 3-5.

Plaintiff Redhail was unable to submit such proof and therefore could not obtain permission to marry. Redhail did not petition the state court for permission to marry. (A.22).

The complaint in this action was filed December 24, 1974. The three-judge court was convened pursuant to 28 U.S.C. 2284 on January 6, 1975. Notice was given to the Governor and the Attorney General as required by 28 U.S.C. 2284 (2), and the defendant subsequently filed his answer. (A. 16-19).

On February 18, 1975, plaintiff filed a motion seeking to have the action maintained as a class action on behalf of all persons subject to the provisions of sec. 245.10, and against a class consisting of all county clerks in the State of Wisconsin. On February 20, 1975, the action was certified as a class action pursuant to Rule 23(b) (2), Federal Rules of Civil Procedure, on behalf of the class of plaintiffs. The class was defined as:

> "All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to sec. 245.10(1), WIS. STATS." (A. 19-20).

The order of February 20, 1975, also established a briefing schedule on the issue of the certification of the defendant class. (A. 20). Plaintiffs filed a brief on the issue. (A. 2). Neither defendant Zablocki nor the Wisconsin Attorney General did so.

A Statement of Uncontested Facts and briefs on the merits were filed, and oral argument was held on June 23, 1975. (A. 2).

On August 31, 1976, the action was certified by the District Court as a class action against the defendant class of county clerks pursuant to Rule 23(b) (2). The defendant class was defined as follows:

> "All county clerks within the State of Wisconsin, all of whom are required by sec. 245.10(1), WIS. STATS., to refuse to issue marriage licenses to the class of plaintiffs without court order." (A. 2-3).

On the same date the District Court issued its decision declaring sec. 245.10(1), (4), and (5), unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and enjoining its enforcement by defendant county clerks. Defendant Zablocki was ordered to mail a copy of the opinion, order and

judgment to all members of the class he represents. Judgment was entered and copies thereof were mailed to the parties. (A. 3).

SUMMARY OF ARGUMENT

I. This action falls within none of the three categories of cases which could make the exercise of the doctrine of abstention appropriate.

The state statute in question is not ambiguous but is clear in its meaning and effect. Therefore, the doctrine announced in Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941) is not applicable.

The type of abstention which in a limited number of cases has been applied to promote comity between the state and federal governments is inappropriate for application here. The Court's decisions in Burford v. Sun Oil Company, 319 U.S. 315 (1943), and Reetz v. Bozanich, 397 U.S. 82 (1970), are inapposite. The exercise of jurisdiction by the District Court caused little confusion or disruption in the operation of Wisconsin's statutory scheme for the regulation of domestic relations. There are no complex or ambiguous issues of fact or law present. Wisconsin has no interest in domestic relations which is not shared by other states. The fact that the statute in question involves domestic relations did not warrant abstention by the District Court. See, e.g. Sosna v. Iowa, 419 U.S. 393 (1975); Boddie v. Connecticut, 401 U.S. 371 (1971).

The doctrine enunciated by this Court in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) does not apply because there were no state court proceedings commenced. Wooley v. Maynard, ____U.S. _____, 45 U.S.L.W. 4379 (dec'd. April 20, 1977).

II. The legislative classification created by sec. 245.10 must be subjected to strict judicial scrutiny because it substantially abridges the right to marry, a right which is included within the right of privacy. Roe v. Wade, 410 U.S. 113 (1974); Loving v. Virginia, 388 U.S. 1 (1967). In addition, sec. 245.10 results in many plaintiffs being completely denied the right to marry because of their poverty. This wealth discrimination provides an additional justification for applying the strict scrutiny standard under the test articulated in San Antonio Ind. School District v. Rodriguez, 411 U.S. 1 (1973).

The strict scrutiny test provides appropriate protection for the competing interests of Wisconsin and the individual. In other cases involving domestic relations the Court has carefully considered these competing interests. See, e.g. Sosna v. Iowa, 419 U.S. 393 (1975); Stanley v. Illinois, 405 U.S. 645 (1972).

The purpose of sec. 245.10, clear from the face of the statute itself, is to prevent the marriage of poor members of the plaintiff class. The denial of a constitutional right is not a legitimate state purpose. Shapiro v. Thompson, 394 U.S. 618 (1969). Other arguable statutory purposes are enforcing the parental duty to support, assuring that children do not become public charges and requiring

counseling of plaintiffs and their intended spouses. But the State has numerous effective ways of accomplishing these purposes which do not abridge the right to marry. Section 245.10 is not even rationally related to these purposes because the only result of the operation of the statute is to grant or deny permission to marry. Therefore, sec. 245.10 violates the Equal Protection Clause.

III. Because the right of privacy is a liberty protected by the Due Process Clause of the Fourteenth Amendment, Roe v. Wade, 410 U.S. 113 (1974), many decisions protecting the right of privacy from unnecessary interference by the state have relied on due process grounds. E.g. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). Because all possible permissable objectives of sec. 245.10 can be accomplished without infringing upon the right to marry, sec. 245.10 deprives plaintiffs of liberty without due process of law.

IV. The representative defendant requests that this Court reverse the judgment of the District Court because the unnamed defendants were not given formal notice of the proceedings. No case or controversy exists under Article III of the Constitution between the named defendant and the plaintiffs because the named defendant received notice and participated in the entire litigation. He therefore has no "personal stake in the outcome." Baker v. Carr, 396 U.S. 186 (1962).

Neither Fed. R. Civ. P. 23 nor the Due Process Clause mandate that notice be given to all members of every 23(b)(2) class. Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974); Hansberry v. Lee, 311 U.S. 32 (1940).

An analysis of the facts present in this case leads to the conclusion that notice to all unnamed defendant class members was not required under either the Due Process Clause or Rule 23. The interest of all absent class members in the action was identical to that of the representative party. The absent class members were adequately represented. In implementing the statute, each class member was acting as an agent of the State. Therefore representation by the Wisconsin Attorney General was most appropriate.

Because of the cohesiveness and unity existent in this class of defendants and the effectiveness of the representation provided, notice to the unnamed members was not required.

ARGUMENT

I. THIS IS NOT A PROPER CASE FOR ABSTENTION.

There are three general categories of cases in which the equitable doctrine of abstention may be exercised by the federal district courts. Colorado River Water Conservation District v. United States, 424 U.S. 813-815 (1976). If a case falls within one of the three categories the court must then carefully consider the facts and apply the doctrine only in special circumstances. Harris County Commissioners Court v. Moore, 420 U.S. 77, 83 (1975). The case at bar falls within none of the categories which would make application of the doctrine appropriate.

A. The statute in question is not ambiguous.

In Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941), the Court held that when a federal constitutional claim is premised on an ambiguous provision of state law the federal court should abstain in order to avoid both needless litigation of federal constitutional issues and federal court error in the interpretation of state law questions. Id. at 501. The doctrine and its rationale remain substantially unchanged. Examining Board of Engineers, Architects and Surveyors v. Otero, 426 U.S. 572 (1976). Although counsel opposed apparently argue that this Court should direct the District Court to abstain under the Pullman doctrine (Brief of Appellants, 16) they point to no ambiguity in sec. 245.10, the statute in question.[1] In fact, in the Statement of Uncontested Facts at 22-23 which was submitted to the District Court, defendants stipulated to the clear meaning of the statute. They reiterate the statute's clear meaning and the effect of its operation on plaintiffs in their brief, at 16-17. Defendants have pointed to no ambiguity

[1]Defendants did not raise the Pullman abstention issue in the District Court. In previous decisions upholding the refusal of district courts to abstain, this Court has considered a party's failure to request the district court to apply the doctrine. Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324, 329 (1964); accord, Lehman Brothers v. Schein, 416 U.S. 386, 393 (1974) (Rehnquist, J. concurring).

because there is none in the statute.[2] Therefore, the Pullman doctrine does not apply.

B. Considerations of comity do not weigh in favor of abstention.

In a limited number of cases the Court has ruled that abstention is appropriate to promote comity between the federal and various state governments. Colorado River Water Conservation District v. U.S., 424 U.S. at 814-816. Defendants argue that the present case is one in which the comity type of abstention is appropriate,[3] citing Burford

[2]With due respect, plaintiffs submit that perhaps defendants misunderstand the Pullman abstention doctrine, for they argue at p. 17 of their brief that sec. 245.10 is "constitutionally uncertain", rather than uncertain in its meaning. There is of course no requirement that federal courts abstain from ruling on the federal constitutionality of a state statute which is clear in meaning simply because the statute is constitutionally uncertain. Lake Carriers' Association v. MacMullan, 406 U.S. 498, 511 (1972). Indeed this Court has noted on many occasions that under our dual system of government the federal judiciary is the primary arbiter of federal constitutional questions. E.g. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415-416 (1964); Zwickler v. Koota, 389 U.S. 241, 245-252 (1967). Plaintiffs welcome defendants' candid admission that sec. 245.10 is constitutionally uncertain.

[3]Defendants failed to raise the comity-based abstention issue in the District Court. See plaintiffs' brief, p. 10, f.n. 1.

v. Sun Oil Company, 319 U.S. 315 (1943), and Reetz v. Bozanich, 397 U.S. 82 (1970). Each of these cases is easily distinguishable from the one at bar.

In Burford a district court in Texas was asked to exercise its diversity jurisdiction to rule on the reasonableness of a Texas administrative agency's determination concerning the rights of private litigants in oil and gas fields. This Court held that the District Court should have abstained because of Texas' peculiar interest in its natural resources, the complex legal and factual issues involved, the District Court's comparative lack of expertise concerning those issues, the fact that Texas had established its own administrative/judicial system to resolve the problems, and the disruptive effect inconsistent federal court decisions would have on the state policy and economy of Texas. Burford, 319 U.S. at 327-334. In Reetz, plaintiffs sued in the Alaska federal District Court alleging that an Alaska statute deprived them of rights under both the Alaska and Federal Constitutions. In ruling that abstention was appropriate, this Court noted that Alaska had a unique concern for its fish resources, that there was an apparent conflict between the state constitution and the statutes in question, both of which related to fishing rights, and that resolution of the conflict between the provisions of state law could obviate the need to resolve the federal constitutional question. Reetz, 397 U.S. at 84-87.

None of the factors the Court considered in Burford and Reetz weigh in favor of abstention in this case. Here there are no complex issues of fact or state law. The only issue of complexity concerns the constitutionality of the unambiguous state statute. This militates against abstention, for the federal courts have the primary role in deciding federal constitutional questions. England v. Louisiana State Board of Medical Examiners, 375 U.S. at 415-416. Unlike the situation in Burford, the statute in question here is severable from Wisconsin's comprehensive statutory scheme concerning domestic relations and there is no administrative system for its enforcement. Therefore, the exercise of jurisdiction by the District Court left undisturbed the remainder of Wisconsin's statutory scheme for domestic relations.

The only point which defendants have advanced in support of their contention that the District Court should have abstained in the interest of comity is the fact that the statute in question is a part of Wisconsin's regulation of domestic relations. Wisconsin does have a strong interest in the domestic relations of its citizens. But that interest is not peculiar to it, as was Alaska's in fishing rights in Reetz or Texas' in oil and gas rights in Burford.

Defendants cite Sosna v. Iowa, 419 U.S. 393 (1975), in support of their argument that the District Court should have abstained in the interest of comity. On the contrary, Sosna is supportive of plaintiffs' position. The Court found no fault with the lower court's exercise of its jurisdiction to determine the constitutionality of an Iowa domestic relations statute. This type of abstention was not even mentioned by the Court. Neither was the doctrine mentioned in Boddie v. Connecticut, 401 U.S. 371 (1971), the only other recent decision in

which this Court reviewed a judgment of a lower federal court concerning the constitutionality of a state domestic relations statute. Further, plaintiffs have been unable to find a single circuit or district court opinion which held the comity-based abstention doctrine a bar to the exercise of its jurisdiction to review the constitutionality of a state statute solely because the statute concerned domestic relations.

This Court has frequently noted the harm done to litigants when district courts delay the exercise of their jurisdiction under the abstention doctrine. Zwickler v. Koota, 389 U.S. 241, 251 (1967). The cost is considerable in terms of money, time and uncertainty. This suit was started more than twenty-eight months ago. Until the litigation is resolved the marital rights and status of the named plaintiff and the class of persons he represents will be in doubt. The defendants did not even raise the question of the applicability of this equitable doctrine in the lower court. Taking all relevant factors into consideration, the extraordinary exception to federal jurisdiction should not be invoked.

C. The Younger-Huffman doctrine is not applicable.

The Court has ruled that special considerations of federalism and comity come into play when a federal district court is asked to intervene in a pending state court proceeding. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Juidice v. Vail,

____U.S. ____, 45 U.S.L.W. 4269 (dec'd. March 22, 1977); Wooley v. Maynard, ____U.S. _____, 45 U.S.L.W. 4379 (dec'd. April 20, 1977). Defendants have cited Huffman in support of their argument that the District Court should have abstained. (Brief of Appellants, 16).[4] The doctrine announced in Younger v. Harris, 401 U.S. 37 (1971), and later held applicable to civil proceedings in Huffman and Juidice is not applicable here because no state court proceeding has ever been commenced.[5]

II. THE CLASSIFICATION CREATED BY SEC. 245.10 VIOLATES PLAINTIFFS' RIGHTS TO EQUAL PROTECTION OF LAW.

A. Section 245.10 substantially burdens plaintiffs' right to marry.

Section 245.10, Wisconsin's "permission to marry" law, creates two groups of adult, healthy, competent Wisconsin residents who wish to marry. One group, the plaintiff class, is composed of those persons who have minor children not in their

[4]The manner in which defendants framed the second of the Questions Presented (Brief of Appellants, 6) might lead the Court to believe that the District Court did not consider the applicability of Huffman to the case at bar. On the contrary, this question was briefed and fully considered by the District Court. (Appendix to Jurisdictional Statement, 3-5).

[5]Presuming that plaintiffs could have brought an action in state court to raise their federal constitutional claims, this Court has frequently and recently made clear that even when a state remedy is available there is no requirement that litigants

custody whom they are under a court-ordered obligation to support. These persons must obtain the permission of a court before they can lawfully marry in Wisconsin or elsewhere. Other persons need not undergo this procedure.

In order to obtain permission to marry, class members must file a verified petition with one of several courts. The person wishing to marry must give notice of the proceeding to the custodian of the minor child or children and, if the issue was of a previous marriage, to the family court commissioners of the county where the divorce was granted and of the county where permission to marry is being sought. A full financial disclosure must be made to the court. Ordinarily a hearing is held at which both parties to the intended marriage must appear. The class member must prove compliance with the prior support order and must also prove that the child or children are not now and are not likely to become public charges. If the class member can prove both elements, permission to marry must be granted; it not, permission must be withheld.[6]

The statute is enforced in several ways. Wisconsin county clerks may not issue a marriage license to class members unless they have obtained a court order granting permission to marry.[7] Class members who wish to marry outside the State of Wisconsin must first obtain the permission

(footnote 5 cont'd)
go first to state court before they can raise constitutional issues in federal court. Lake Carriers' Association v. MacMullan, 406 U.S. at 510; Zwickler v. Koota, 389 U.S. at 248.

[6]WIS. STAT. sec. 245.10(1) (1975)

[7]WIS. STAT. sec. 245.10(1) (1975)

of a Wisconsin court or the marriage will be void.[8] In addition, class members who marry without permission are subject to criminal penalties.[9]

It is plain that the classification created by sec. 245.10 substantially burdens the right of plaintiff class members to marry. All must endure the delay, expense and uncertainty of the statutory procedure as well as meet the requirement of full financial disclosure. Many, such as Roger Redhail, are unable to marry anywhere as long as they remain residents of the State of Wisconsin because they are indigent or have limited income. If Redhail were to petition for permission to marry, permission would be denied because, due to his indigency, he has been unable to satisfy the support obligation ordered in the paternity action. Furthermore, even if he had fully complied with the prior support order or could somehow pay the arrearage due, permission to marry would still be denied because his child receives welfare benefits in excess of the $109 per month support obligation and therefore would remain a public charge.

The permission to marry statute restricts the rights of others besides plaintiffs. Men or women who want to marry a member of the plaintiff class are subject to the same burden as plaintiffs themselves. They must generally participate in the statutorily required procedure and suffer the delay

[8]WIS. STAT. sec. 245.10 (4), (5) (1975)

[9]WIS. STAT. sec. 245.30(1)(f) (1975)

and uncertainty it entails. If permission to marry is denied, they are deprived of their right to marry as completely as are plaintiffs.[10]

B. Strict scrutiny is the proper test for determining whether the classification created by sec. 245.10 denies plaintiffs equal protection.

This Court's equal protection analysis requires that a legislative classification which interferes with the exercise of a fundamental right or discriminates against a suspect class be subjected to strict judicial scrutiny. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-313 (1976); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The legislative classification created by the permission to marry law interferes with the fundamental right to marry of both plaintiff class members and the people who wish to marry them. Additionally, the statute presents the type of wealth discrimination which this Court has held must be strictly scrutinized.

1. The right to marry is a fundamental right.

In decisions spanning over fifty years, this Court has recognized that the right to marry is a fundamental right of citizens, encompassed by and perhaps basic to the right of personal privacy guaranteed by the United States Constitution.

The right of privacy is not explicitly guaranteed by the Constitution. Yet this Court has repeatedly held that certain zones of privacy do exist under the

[10] This analysis is similar to the Court's analysis of First Amendment issues in Procunier v. Martinez, 416 U.S. 396 (1974).

Constitution. See Roe v. Wade, 410 U.S. 113, 152-153 (1973) and cases cited therein. The right of privacy is now recognized as "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action". Id. at 153.

One facet of this right of privacy is the right of freedom of choice in family matters. Citizens have a right to be free from undue state interference in their decisions on whether and whom to marry, whether to have children, and how their children should be raised and educated. Paul v. Davis, 424 U.S. 693, 713 (1976).

Plaintiffs submit that the right to marry is the most basic of the privacy rights. In our society, marriage is regarded as the foundation of the family.

In a long line of decisions, this Court has emphasized that marriage is a fundamental right in a free society. In 1923, the Court held that:

> "Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923). [emphasis supplied].

In 1942, the Court held that an Oklahoma statute allowing sterilization of "habitual criminals" was unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Skinner v. Oklahoma, 316 U.S. 535 (1942). The Court subjected the statutory classification to strict scrutiny because:

> "We are dealing here with legislation which involves one of the basic rights of men. Marriage and precreation are fundamental to the very existence of the race." 316 U.S. at 541.

The inclusion of the marital relationship among fundamental rights was again noted in Griswold v. Connecticut, 381 U.S. 479 (1965). In that case a statute forbidding the use of contraceptives was held invalid as a violation of the right to marital privacy. Mr. Justice Douglas, writing for the majority, stated:

> "We deal here with a right of privacy older than the Bill of Rights . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred . . . [I]t is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. at 486.

Goldberg, J. concurring wrote:

> "The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected." 381 U.S. at 496.

In Loving v. Virginia, 388 U.S. 1 (1967), the Court considered the constitutionality of Virginia's miscegenation statutes, which restricted the right of the individual to marry the person of his or her choice. In addition to ruling that the statutes violated the Equal Protection Clause, the Court held that they deprived the Lovings of liberty without due process of law in that:

> "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State." 388 U.S. at 12. (cites omitted).

The decisions in Boddie v. Connecticut, 401 U.S. 371 (1971) and United States v. Kras, 409 U.S. 434 (1973) provide further support to plaintiffs' position.

In Boddie, plaintiffs maintained that state statutes which prevented indigents from getting a divorce without paying filing fees was unconstitutional. The Court agreed. Citing Skinner v. Oklahoma and Loving v. Virginia, the Court noted

that the state has monopolized the means for legally dissolving the marital relationship, and the individual is unable to free himself ". . . from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without involving the state's judicial machinery." 401 U. S. at 376.

In United States v. Kras, the issue was whether the United States could constitutionally deny a discharge in bankruptcy to indigents who were unable to pay the filing fee. Boddie was distinguished as follows:

> "The denial of access to the judicial forum in Boddie touched directly, as has been noted, on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. The Boddie appellants' inability to dissolve their marriages seriously impaired their freedom to pursue their protected associational activities." 409 U. S. at 444-445. (cites omitted).

In Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974), the Court again held that "Freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Id. at 639-640.

These decisions make it clear that the right to marry is a fundamental right.[11]

2. Section 245.10 creates a suspect classification based on wealth.

Section 245.10 imposes a substantial burden on all plaintiff class members and the people they wish to marry. For poor and low-income persons however, the burden is much more severe. If Roger Redhail had petitioned for permission to marry, permission would have been denied since, because of indigency, he had not been able to comply with the support order made in the paternity action. Even if he had complied fully or was able somehow to pay the arrearage, permission would still have been denied because his child receives welfare benefits in excess of the court-ordered support.[12] Plaintiffs in Redhail's position, those who are too poor to pay existing arrearages or enough support

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[11] Lower courts which have decided the issue have held unanimously that any interference with the right to marry must be strictly scrutinized. Pederson v. Burton, 400 F. Supp. 960, 962 (D. D. C. 1975); O'Neill v. Dent, 364 F. Supp. 565, 568-569 (E. D. N. Y. 1973); Holt v. Shelton, 341 F. Supp. 821, 822-832 (M. D. Tenn. 1972).

[12] The plaintiff in the companion case, Leipzig v. Pallamolla, 418 F. Supp. 1073 (E. D. Wis. 1976), had complied with his support obligation but was denied permission to marry because his four minor children received AFDC benefits.

to assure that their children are not and are not likely to become public charges, are barred from marrying. This wealth discrimination inherent in the statute provides an additional ground for applying the standard of strict scrutiny.

Legislation which affects the poor more severely than the affluent is common; this unequal effect is unavoidable and in itself does not invoke the strict scrutiny test. San Antonio Ind. School District v. Rodriguez, 411 U.S. 1, 29 (1973). However, classifications based on wealth have been strictly scrutinized and overturned in the area of voting and elections, Bullock v. Carter, 405 U.S. 134 (1972); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1963); Kramer v. Union Free School District, 395 U.S. 621 (1969); criminal procedure, e.g. Douglas v. California, 372 U.S. 353 (1963); and incarceration, Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

In San Antonio Ind. School District v. Rodriguez, this Court reviewed its prior decisions and articulated the distinguishing characteristics of wealth discrimination which must be strictly scrutinized.

> "The individuals or groups of individuals who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." 411 U.S. at 20.

These characteristics are present with respect to Roger Redhail and many other class members who are too poor either to satisfy their support obligations or to pay enough support to assure that their children will not be public charges. Because of their poverty, Wisconsin denies those class members the right to marry and lawfully have and raise children together. Therefore the statute does more than unequally affect the poor; it absolutely deprives them of the right to enjoy the fundamentally important benefits of marriage and family life.

3. Classifications affecting the right to marry should not be excepted from the strict scrutiny test.

Defendants concede that the right to marry is a fundamental right. (Jurisdictional Statement, 7). They argue, however, that marriage requirements should be excepted from the strict scrutiny test normally employed when a fundamental right is abridged. They ask this Court to apply the rational relationship test because domestic relations are traditionally within the control of the states. This argument is without merit.[13]

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[13]There is a line of cases which holds, often in sweeping language, that federal courts do not have diversity jurisdiction to grant divorces or alimony or to determine questions of child custody. See e.g. Barber v. Barber, 21 How. 582, 584, 16 L. Ed. 226 (1859); Ex Parte Burrus, 136 U.S. 586 (1890); Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930). This rule, which was based upon the historical limits of English equity jurisdiction, see Spindel v. Spindel, 283 F. Supp. 797 (E.D. N.Y. 1968), has no relevance to the case at bar which seeks protection of federal constitutional rights.

In our federal system, many areas of law are within the province of the states. Yet the states' power to regulate is limited by the United States Constitution. Indeed, the purpose of the Bill of Rights and the Fourteenth Amendment is to protect the interests of the individual or group of individuals from overzealous regulation and control by the government.

There is no question that the states have a vital interest in the domestic relations of their citizens. There is also no question that the right to marry is of fundamental importance to the individual and is one of the liberties protected by the Fourteenth Amendment. Where fundamental individual rights are abridged, the Court carefully considers the interests of both the individual and the state. The state may abridge fundamental rights but only if necessary to accomplish a compelling state purpose. Defendants' contention that a legislative classification which infringes upon the right to marry must be upheld unless arbitrary or unrelated to the achievement of a legitimate state purpose ignores the individual interests involved in marriage.

In numerous cases involving regulation of the broad area of domestic relations, this Court has carefully considered and weighed the competing interests of the state and the individual. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 66-72 (1976); Stanley v. Illinois, 405 U.S. 645 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965). In all of these cases, the Court held that the state's interest in regulating domestic relations did not justify the restriction of individual rights.

Sosna v. Iowa, 419 U.S. 393 (1975), which involved a challenge to Iowa's one year durational residency requirement for divorce, reached a different result, but again only after a careful consideration of the interests of the state and of the individual. While the Court did not expressly state the equal protection test it applied in upholding the Iowa statute, it noted the effect of the statute on persons who had recently exercised their right to travel was different than that of the statutes considered in Shapiro v. Thompson, in that persons were not irretrievably foreclosed from obtaining at least some part of what they sought. 419 U.S. at 406. It also noted that the statute promoted several very substantial state interests. Id. at 406-409. These factors - the relatively insubstantial burden upon individual rights weighed against the very substantial state interests - underlie the Court's decision in Sosna. The Court did not apply the more lenient equal protection test.[14]

Defendants argue that all marriage requirements would be struck down if the strict scrutiny test is applied. (Brief of Appellants 14). This is simply untrue. Reasonable age and competency requirements are necessary to assure that people in fact consent to enter into the marriage contract.

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[14]Furthermore, Sosna involved the right to seek immediate dissolution of marriage, not the right to marry. While the two areas are indirectly related they are not identical. All states closely regulate who may seek a divorce from its courts, the procedure required in a divorce action and for what causes a divorce may be granted. Forty-eight of the fifty states have some sort of durational residency requirement. 419 U.S. at 404.

Reasonable fee and flexible solemnization requirements are not a substantial burden on the right to marry and therefore do not amount to constitutional violations. Health requirements such as Wisconsin's which are narrowly drawn so that only those persons with active, communicable venereal disease may not marry, WIS. STAT. sec. 245.06-.07 (1975), could certainly withstand strict scrutiny. Defendants' argument that state regulation against polygamy could not meet the strict equal protection standard is frivolous. Marriage has always been defined in this society as the union of one man and one woman. See Reynolds v. United States, 98 U.S. 145 (1878).

C. Section 245.10 cannot withstand strict scrutiny.

The strict scrutiny test is demanding; the state bears the burden of showing that the statutory classification promotes a legitimate and compelling state interest and that the statute is "narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. at 155; Shapiro v. Thompson, 394 U.S. at 634.

The first step in the analysis is to determine what interests Wisconsin seeks to promote by the permission to marry law. Defendants argued in the District Court that sec. 245.10 promotes two state interests: providing counseling to prospective marriage partners regarding the pre-existing support obligation, and protecting the welfare of children. Appendix to Jurisdictional Statement 15 (hereafter "A.J.S."). In this Court, they argue that "It should be apparent that the principal governmental interest is in the welfare of children, that provision for such children should be accommodated before new marital obligations are undertaken." (Brief of Appellants, 12).

This Court has left open the question of whether it should accept the statement of a state's Assistant Attorney General as to the objectives of the legislature or whether it "must determine if the litigant simply is selecting a convenient, but false, post-hoc rationalization." Craig v. Boren, ____U.S. _____, 97 S.Ct. 451, 458 n.7 (1976). In view of the shifting and rather vague statutory objectives claimed by the defendants in this case, plaintiffs submit that the Court should carefully examine the statute itself and the little available legislative history to determine the legislative purpose.

There is some evidence that the intention of the Committee which drafted sec. 245.10 was to provide counseling. The forerunner of the present statute was introduced into the Wisconsin Assembly in 1959 by the Wisconsin Legislative Council as part of Bill No. 151A, a comprehensive revision of Wisconsin's Family Code. Section 245.10 as introduced was a simple provision which required that persons with court-ordered support obligations to minor issue of a prior marriage obtain court approval before obtaining a marriage license.[15] The notes of the drafting committee explained the purpose of the provision as follows:

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[15] "Approval of Judge required in certain cases. When it appears that either applicant has minor issue of a prior marriage not in his custody and which he is under obligation to support by court order or judgment, no license shall be issued without the approval of a judge of a court having divorce jurisdiction in the County of application." Bill No. 151A, Sec. 245.10.

"Several recommendations made by the committee are based on the principle that the process of getting married should be in accord with the seriousness of marriage. This principle is reflected in the following proposal: . . . (3) Divorced persons who have support obligations to children of a former marriage must obtain judicial consent to remarry. This provides an opportunity to counsel such person particularly when he has failed in fulfilling present obligations. His intended partner will also be aware of these obligations before the marriage. The provision, of course, is not designed to preclude the contemplated marriage but merely assure that there is an awareness of the situation." Wisconsin Legislative Council - General Report, Vol. 5, 1959.

However, WIS. STAT. sec. 245.10 (1959) as enacted into law by the Wisconsin Legislature was substantially amended. Besides providing a procedure for obtaining court permission to marry, it required the applicant to prove either compliance with the previous support order or good cause why the permission should be granted, and made any order withholding permission to marry an appealable order. [16]

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16 "245.10 Permission of judge required in certain cases. When it appears that either applicant has minor issue of a prior marriage not in his custody and which he is under obligation to support by court order or judgment, no license shall be issued without the written permission of a judge of a court having divorce jurisdiction in the county of application. The judge shall, within 5 days after any such permission is sought, either grant the same or

In 1961, the statute was again amended. The requirement that the marriage license applicant prove that the children are not and are not likely to become public charges was added and the court's discretion to permit the marriage for "good cause" was deleted. [17]

(footnote 16 cont'd)

order a court hearing in the matter to allow said applicant to furnish proof of his compliance with such prior court obligation. The judge may allow the admission of other pertinent evidence. Upon the hearing, if said applicant furnishes such proof, or shows good cause why a marriage license should be issued to him in the absence thereof, the court shall grant such permission; otherwise permission for a license shall be ordered withheld until such proof is furnished or good cause shown, but any court order withholding such permission shall be deemed an appealable order." WIS. STAT. sec. 245.10 (1959).

17 "245.10 Permission of court required for certain marriages. When either applicant has minor issue of a prior marriage not in his custody and which he is under obligation to support by court order or judgment, no license shall be issued without the order of a court having divorce jurisdiction in the county of application. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall either grant such order or direct a court hearing to be held in the matter to allow said applicant to submit proof of his compliance with such prior court obligation. No such order shall be granted, or

In 1969, the statute was further amended to require parents of out of wedlock children as well as divorced parents to obtain court permission to marry.[18]

The Committee notes indicate that the purpose of the statute as introduced was to provide mandatory counseling, but there are no materials to establish or shed light upon the legislative purpose of sec. 245.10 as enacted or as amended. However,

(footnote 17 cont'd)

> hearing held, unless both applicants for such license appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of such petition at least 5 days prior to the court order or hearing, unless such appearance or notice has been waived by the court upon good cause shown. Upon the hearing, if said applicant submits such proof and makes a showing that such children are not and are not likely to become public charges, the court shall grant such order, a copy of which shall be filed in any prior divorce action of such applicant in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and showing is made, but any court order withholding such permission is an appealable order. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere." WIS. STAT. sec. 245.10 (1961).

[18]Other amendments, not directly relevant to the issues in this case, were made in 1961, 1965, 1969 and 1971.

plaintiffs submit that the purpose of the statute is clear from the unambiguous language employed and from the natural and unavoidable effect of the statute. State of Wisconsin v. J.C. Penny Co., 311 U.S. 435, 443-444 (1941). The purpose of sec. 245.10 is simply to prohibit the marriage of those persons who are unable to comply with their prior support obligations or who are unable to pay enough support to assure that their children are not and are not likely to become public charges. The Legislature must be presumed to have intended what it did in fact accomplish. All that is accomplished by sec. 245.10 is the prohibition of marriage by those who are financially unable to meet the standards of the statute.

Plaintiffs do not dispute that sec. 245.10 is an effective means of preventing many Wisconsin residents from lawfully marrying. The statutory procedure acts as a net; all plaintiff class members and their intended spouses must pass through it so that the State can identify and prohibit the marriage of those whom it has decided may not marry. However, the purpose of denying to certain indigent persons the right to marry is not a legitimate state purpose.

The right to marry is a well-established, constitutionally protected right. If a law has no other purpose than to deny a constitutional right, it is "patently unconstitutional." Shapiro v. Thompson, 394 U.S. at 631; United States v. Jackson, 390 U.S. 570, 581 (1968). If the purpose of sec. 245.10 is to deprive a class of citizens of the right to decide when and whom to marry, it must fail.

Furthermore, if the purpose of the law is to deny the right to marry to poor members of the plaintiff class, then the purpose of the law is to discriminate against a class of poor persons. "The States, of course, are prohibited by the Equal Protection Clause from discriminating between the 'rich' and 'poor' as such in the formulation and application of their laws." Douglas v. People of State of California, 372 U. S. 353, 361 (1963) (Clark, J. dissenting) (emphasis in original).

Because the statute focuses upon the support obligation, it might be argued that the purpose of the statute is to protect the welfare of children by enforcing the parental obligation to support. But this argument is rebutted by the terms of the statute itself. The only authority given to the court in a permission to marry proceeding is authority to grant or withhold permission to marry. The court may not actively enforce the support obligation in any way. If the legislature had intended sec. 245.10 as a support enforcement tool, it would have given the court the power to in fact enforce support.

Assuming for argument that the purpose of sec. 245.10 is to enforce the parental duty of support and assuming that support enforcement is a compelling state interest, sec. 245.10 is not necessary to the accomplishment of this purpose. A brief survey of Wisconsin statutes establishes that the state has many potent means of enforcing a parent's obligation to support his or her children. If the child or children in question are issue of a former marriage, WIS. STAT. sec. 247.232 and sec. 245.265 (1975), give the judge and family court commissioner authority to order the parent to

execute a wage assignment to assure that future support payments will be made regularly and that arrears will be paid. WIS. STAT. sec. 247.37 (1) (a) (1975), requires the judgment of divorce to include a provision warning that disobedience of the court's order is punishable under WIS. STAT. sec. 295.03 (1975), by commitment to the county jail or House of Correction until the judgment is complied with. WIS. STAT. sec. 295.03 (1975), contains a provision excepting contempt actions in divorce or legal separation cases from the usual requirement of proof of personal demand of payment and refusal to pay. Where the order of support results from an adjudication in a paternity proceeding pursuant to Chapter 52 of the Wisconsin Statutes, the court's powers to enforce its support orders are similar, in that the court has the power to order the parent to execute a wage assignment, WIS. STAT. sec. 52.21(2) (1975), or to commit the parent to the county jail, WIS. STAT. sec. 52.40 (1975). In both divorce and paternity actions, the court may at any time modify the judgment to increase the support order as the circumstances of the parent allow. WIS. STATS. sec. 247.25, sec. 52.38 (1975).

In addition to these civil remedies, the State may proceed against a non-supporting parent criminally under WIS. STAT. sec. 52.05 (1975), which makes abandonment of a minor child, whether born in or out of wedlock, a felony, or under WIS. STAT. sec. 52.055 (1975), which makes failure to support a minor child a misdemeanor. In either criminal action, the court may, in lieu of penalty, place the defendant on probation on condition that he or she pay a certain sum as support. If the defendant on probation fails to support as ordered, the court may then proceed on the original charge,

enforce the suspended sentence, or punish the defendant for contempt and commit him to the county jail under WIS. STAT. sec. 52.08 (1975), the work release law.

Finally, Congress has recently acted to provide substantial assistance to the states and to the custodians of children in collecting parental support. Besides providing financial assistance to states in locating parents and enforcing support, Congress has authorized various federal agencies to assist states and custodians in locating parents and has authorized the federal courts to hear certain support enforcement actions. 42 U.S.C. sections 602 et seq., (Supp. 1976).

It might be argued that the knowledge that permission to marry can be denied encourages parents to comply with the court ordered support obligation. However, considering the other support enforcement tools available in Wisconsin, such "encouragement" can hardly be considered necessary. It might also be argued that sec. 245.10 encourages non-custodial parents to agree to pay more support than the court had ordered so that their children would not be public charges and permission to marry will be granted. However, parents in Redhail's situation are rarely able to pay more support. [19]

[19] It is noteworthy that all of Wisconsin's methods of determining and enforcing the support obligation take into account the income and assets of the non-custodial parent. E.g. WIS. STATS. 247.24(1)(a); sec. 247.32; sec. 52.21(2) (1975); Kutzik v. Kutzik, 21 Wis. 2d 442, 124 N.W. 2d 581, 585 (1963). The amount of support ordered generally represents the court's considered opinion as to what the individual is reasonably

Further, those persons who arguably could pay more support are forced into making a choice; they must either give up their constitutional right to marry or give up their statutory right to have their support obligation determined by a court in the statutory procedure based on the statutory factors. The state may not, under the United States Constitution, require an individual to make such a choice. See, e.g. Perry v. Sindermann, 408 U.S. 593 (1972).

Therefore, if sec. 245.10 was intended as an indirect method of support enforcement, the State clearly has numerous effective ways to assure that all parents will support their children to the best of their ability without abridging the right to marry.

Since the statute requires that the parent prove that the children are not and are not likely to become public charges in order to obtain permission, it might be argued that the purpose of the statute is to prevent children from becoming public charges. This argument is somewhat supported by dictum in the Wisconsin Supreme Court decision of Beberfall

(footnote 19 cont'd)

able to pay. Yet, if that amount is not sufficient to keep the children off welfare, permission to marry will be denied. An indigent support-owing parent cannot be held in contempt of court for failure to pay support because this failure would not be "willful." O'Connor v. O'Connor, 48 Wis. 2d 535, 180 N.W. 2d 735 (1970), yet sec. 245.10 contains no analogous safeguard.

v. Beberfall, 54 Wis. 2d 229, 195 N.W. 2d 625, 629 (1972).[20]

> "The policy behind this statute is to make certain that the children of the first marriage are not to become public charges."

The interest in preventing children from becoming public charges is similar to the interest in enforcing the parental duty to support. It is also clearly related to Wisconsin's interest in saving welfare costs. Plaintiffs have demonstrated that sec. 245.10 is not intended as a support enforcement tool and that, even if it were intended to enforce support, it is not necessary to the accomplishment of that purpose. The argument that preventing children from becoming public charges justifies sec. 245.10 shares these defects. Furthermore, it is well-settled that the saving of welfare costs is not a compelling state interest and will not justify the infringement on plaintiffs' fundamental right to marry.

> "We recognize that a state has a valid interest in the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures,

[20]The only other Wisconsin Supreme Court statement of the legislative purpose of sec. 245.10 is found in State v. Mueller, 44 Wis. 2d 387, 171 N.W. 2d 414 (1969):

> ". . . the interest Wisconsin seeks to protect is a legitimate and substantial protectable interest both as to the protection of the welfare of its minors and the marriage relationship of its residents. . ." 171 N.W. 2d at 418.

This statement of purpose is too vague to be helpful.

> whether for public assistance, education, or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification."
> Shapiro v. Thompson, 394 U.S. at 633.

Finally, it might be argued, based upon the notes of the original drafting committee, that the purpose of sec. 245.10 is to require counseling regarding the importance of meeting support obligations.[21] However, the statute itself has nothing to do with counseling.

Even if the purpose of sec. 245.10 were to provide counseling, it could not justify the statutory classification. As the District Court noted, counseling is not a compelling state interest and the statute is not "narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. at 155.

It is clear that the State of Wisconsin can achieve all of the possible permissible objectives of sec. 245.10 without interfering with the fundamental right to marry. It is important to note that while every other state presumably has the same interests as the State of Wisconsin in the marital relationship and the support of children, plaintiffs have been unable to find any other state with the same statutory requirement. Apparently, the legislatures of the other forty-nine states have not found such a restriction to be necessary to promote any legitimate state interest.

[21]Defendants no longer raise this argument in justification of this statute.

D. Section 245.10 does not rationally further any legitimate state interest.

The statutory classification created by sec. 245.10 does not rationally further any legitimate, articulated state purpose and therefore cannot withstand even the less stringent "rational relationship" standard of equal protection analysis. San Antonio Ind. School District v. Rodriguez, 411 U.S. at 17; Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Defendants argue that Wisconsin's interest in protecting children provides more than a reasonable basis for the statutory classification. (Brief of Appellants, 15). But nowhere do they explain just what the relationship is between the broad interest in the protection of children and the permission to marry law.

Plaintiffs have illustrated that the purpose of the statute is to prevent the marriage of those persons who have been unable to comply with existing support orders or who are unable to pay enough support to keep their children from becoming public charges. A law which has as its purpose the denial of the right to marry to indigent persons is doubly unconstitutional; the denial of constitutional rights is not a legitimate state purpose, and states may not formulate and apply their laws to discriminate against the poor.

It might be argued that sec. 245.10 protects children by prohibiting poor parents from marrying, thereby preventing them from ta' ing on new financial obligations which would interfere with their ability to comply with existing obligations. The statute was first enacted in 1959 when, in the great majority of divorces, the mother was awarded custody of the children and the father was orderd

to pay support. E.g. Welker v. Welker, 24 Wis. 2d 570, 129 N.W. 2d 134 (1964). Perhaps the legislature assumed that the support-obligated father would by marriage necessarily become responsible for the financial support of his new wife and therefore be less able to provide for his children. However, this is precisely the sort of legislative assumption which the Court has held to be an insufficient basis for statutory classifications. E.g., Califano v. Goldfarb, ____U.S. ____, 97 S.Ct. 1021, 1025-1027 (1977); Weinberger v. Weisenfeld, 420 U.S. 636, 643-646 (1975). It is true that, by marriage, a father takes on the legal obligation to support his new spouse. However, the duty of spousal support extends to both partners in the marriage. WIS. STAT. sec. 52.01 (1975). In fact, the likelihood of a work'ng spouse[22] makes it reasonable to believe that many plaintiffs would actually improve their financial situation through marriage and thus be better able to support their children.

While the marrying parent and new spouse may proceed to have children, many couples, of course, do not. And many people proceed to have children without the benefit of marriage. According to Public Health Statistics - Wisconsin 1974, six

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[22]In 1975, 44.4% of all married women were working outside the home. See, A Statistical Portrait of Women in the United States, 1975 U.S. Department of Commerce, Bureau of Census (Current population reports: Special Studies: Series P'23; no. 58). Table 7-4, p. 30.

thousand five hundred ninety-four children were born to unmarried parents in Wisconsin in that year. Since a parent has an obligation to support an out of wedlock child, it is clear that sec. 245.10 does not prevent people from incurring new support obligations.

Furthermore, many people who are required to obtain court permission to marry attempt to marry in other states without permission.[23] While these marriages are declared void by sec. 245.10 (5), the duty of spousal support exists unless and until the marriage is annulled and may continue after any judgment of annulment. WIS. STAT. sec. 247.245 (1975).

Plaintiffs have argued that sec. 245.10 is not intended as a means of enforcing the parental duty to support. But assuming for argument that the statute is intended to promote the welfare of children by enforcing the parental duty of support and preventing children from becoming public charges, it is ineffective. Those parents who can demonstrate that they have fully complied with the prior support order and whose children are not, and are not likely to become public charges are subjected to the delay of the court proceedings as well as the requirement that they disclose their financial resources to the court before they are allowed to marry. This delay and disclosure, while burdensome to the individual, accomplishes nothing for the children or for the State.

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[23] See In re Parson's Trust, 56 Wis. 2d 613, 203 N.W. 2d 40 (1973); State v. Mueller, 44 Wis. 2d 387, 171 N.W. 2d 414 (1969).

Those parents who cannot make the requisite showing are totally denied the right to marry for as long as they continue to be residents of Wisconsin. This accomplishes nothing towards promoting the interest in support enforcement. The children of persons who are denied permission to marry, whether because the parent is behind in support payments or because the children are public charges, are simply unaffected by the procedure. If permission to marry is denied, the back support will still be owing; the child will still receive public assistance. If the State or the child's custodian believes that the support-obligated parent might be able to pay the arrearages or be able to pay an increased support order, resort must still be had to one of the support enforcement tools available under Wisconsin law.

Plaintiffs have contended that despite the notes of the Drafting Committee, the terms of sec. 245.10 preclude any argument that its purpose is to provide mandatory counseling to prospective marriage partners. If this were the purpose, the statute would be completely irrational. Assuming for argument that the State has a legitimate interest in providing counseling before marriage to persons with pre-existing support obligations, sec. 245.10 does not require or even provide that plaintiffs submit to counseling nor does it require the court hearing the petition for permission to marry to counsel the petitioner regarding his or her support obligations. The statutory requirements are limited to an examination of the petitioner's compliance with the support order and of his or her ability to provide enough support to prevent the children from becoming public charges. Indeed, the statute allows the court to waive the hearing if it is satisfied from court records, family support records,

and the petitioner's financial disclosure that the statutory requirements are met. The hearing offers the only opportunity for counseling the marriage license applicants. Therefore, if the purpose of the statute were to provide counseling, allowing waiver of the hearing would defeat the purpose of the statute.

III. SECTION 245.10 DEPRIVES PLAINTIFFS OF LIBERTY WITHOUT DUE PROCESS OF LAW.

The right to independence and freedom of choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639 (1974); Roe v. Wade, 410 U.S. at 153. The District Court found that the statutory classification created by sec. 245.10 impermissibly abridges plaintiffs' right to marry in violation of the Equal Protection Clause. Plaintiffs submit that sec. 245.10 also abridges their right to marry in violation of the Due Process Clause.

Many of this Court's decisions invalidating statutes or regulations which interfered with the right of privacy have relied on due process grounds. Cleveland Board of Education v. LaFleur; Roe v. Wade; Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923). Some matters are so personal, so basic to our society and our society's concept of liberty that due process prohibits unnecessary state interference with individual choice.

The cases cited above establish that the right of privacy encompasses the decision to marry as well as matters involving contraception, procreation, family relationships and child rearing and education. Paul v. Davis, 424 U.S. 693, 712-713 (1976). These cases also establish that states may abridge the right of privacy only where necessary to promote a compelling state interest, Roe v. Wade, 410 U.S. at 155, (citing Shapiro v. Thompson, 394 U.S. at 634), and then only to the extent necessary to achieve that interest. Shelton v. Tucker, 364 U.S. 479 (1960). This test is the same as the "strict scrutiny" equal protection test.

Plaintiffs have demonstrated that sec. 245.10 substantially abridges not only their right to marry, but also the right of their intended marriage partners. A statute which requires an otherwise qualified adult to seek the permission of the court to marry, which mandates that a person prove to the court that he or she is financially able to marry and which often denies the right to marry because of poverty, surely invades the zone of privacy.

Plaintiffs have also demonstrated that the permission to marry law is not necessary to promote any compelling state interest because the state has means of achieving each possible legitimate objective of sec. 245.10 without abridging the right to marry. For these reasons, sec. 245.10 is invalid as a violation of the Due Process Clause of the Fourteenth Amendment.

IV. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT ABSENT DEFENDANT CLASS MEMBERS NEED NOT BE GIVEN NOTICE.

A. No case or controversy exists between the representative defendant and the plaintiffs on this issue.

In addressing the class action issue, plaintiffs first question whether the requisite case or controversy under Article III of the Constitution exists between the plaintiffs and the named defendant. The named defendant by counsel and the Wisconsin Attorney General participated in this litigation from beginning to end. They now ask this Court to reverse the District Court because parties other than themselves did not receive notice and were presumably thereby somehow harmed. But the named defendant has absolutely no "personal stake in the outcome" of this issue. Baker v. Carr, 369 U.S. 186, 204 (1962). The judgment of the District Court, if it is correct, will be binding upon him. Further, none of the unnamed defendants have, either in the District Court or in this Court, alleged their rights were violated or that any harm was done to them. Nor has the representative defendant pointed to any harm done to those unnamed.[24] This Court therefore is being

[24] In its pre-trial order of February 20, 1975, the District Court invited counsel for the named defendant and the Wisconsin Attorney General to submit in writing any objections to the case being maintained as a class action with respect to the defendants. Neither counsel for the named defendant nor the Wisconsin Attorney General, who participated in the pre-trial conference, filed an

asked to rule on a claim based on "speculation and conjecture." O'Shea v. Littleton, 414 U.S. 488, 497 (1974). If any of the unnamed class members take the position that they should not be bound by the judgment they can raise this argument by collateral attack. Advisory Committee Note, 39 F.R.D. 73, 106 (1966).

B. Neither the Due Process Clause nor Fed. R. Civ. P. 23(d) required the District Court to provide notice to the unnamed defendant class members.

Defendants rely solely on Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974) and Fed. R. Civ. P. 23(c)(2) as authority for the argument that Rule 23 and due process require that notice be given to the absent members of the class in this case.[25] (Brief of Appellants, 18-19). Defendants' reliance is misplaced because the

(footnote 24 cont'd)

objection. (A. 19-20). Instead, counsel opposed waited six months to voice their concern regarding lack of notice at the oral argument before the three-judge panel on the merits of the case. Even then they did not indicate the reason for their objection. (A. J.S. 5).

[25] Defendants' arguments sweep broadly and could be interpreted to advance the proposition that due process requires notice to all class members in every class action. (Brief of Appellants, 17-19). However, in light of the uniqueness of this position, the brevity of defendants' argument, the lack of authority cited and the recent authority contra, plaintiffs presume that defendants' due process claim is limited to the facts of this case. Sosna v. Iowa, 419 U.S. 393, 397 n.4 (1975). See also,

present action is a Rule 23(b) (2) class action.[26] The mandatory notice provision of Rule 23 (c) (2) applies only to 23(b) (3) actions. The decision in Eisen is specifically limited to (b) (3) actions and did not discuss notice requirements in (b) (2) cases. 417 U.S. at 178 n. 14.

The provision of notice to class members in (b) (2) actions is governed by 23(d) and, of course, the Due Process Clause. Neither due process nor Rule 23 require that notice be given to each member of every (b)(2) class. Hansberry v. Lee, 311 U.S. 32, 42-44 (1940); Note, The Importance of Being Adequate: Due Process Requirements in Class Actions Under Rule 23, 123 U. Pa. L. Rev. 1217, 1226-1227 (1975); Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 45 (1967); Benett, Eisen v. Carlisle and Jacquelin: Supreme Court Calls for Revamping of Class Action Strategy, 1974 Wis. L. Rev. 801, 805; Miller, Problems of Giving Notice in Class

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(footnote 25 cont'd)
Hanna v. Plumer, 380 U.S. 460, 471 (1965), holding that there is a strong presumption as to the constitutionality of the Federal Rules of Civil Procedure.

[26] Defendants have not appealed the District Court's finding that they constitute an appropriate class under Fed. R. Civ. P. 23(a) and (b) (2). Three of the prerequisites of 23(a), commonality, typicality and adequacy of representation, and the requirement of 23(b) (2) that the party opposed has acted on grounds applicable to all class members, provide considerable protection of the interests of unnamed parties. See Advisory Committee's Note, 39 F.R.D. 73, 100, 102 (1966).

Actions, 58 F.R.D. 313, 314-315 (1973); 3B Moore's Federal Practice, Paragraph 23.55.

In determining what orders are necessary for the protection of unnamed members of a particular (b) (2) class, the court should consider all circumstances present in that case. Frankel, Some Preliminary Observations Concerning Rule 23, 43 F.R.D. at 45-46. A consideration of the facts in this case inexorably leads to the conclusion that notice to the unnamed defendants was not required:

1. The interest of each defendant class member in the suit was identical. Each of the seventy-two counties in the State of Wisconsin has a county clerk. These clerks comprise the class of defendants in this action. Each is prohibited by sec. 245.10 from issuing a marriage license absent the court order required by that statute. The only issue for decision on the merits in the case is whether each of the members of the class of defendants acted in a constitutionally permissable manner in refusing to issue a marriage license pursuant to sec. 245.10. The claim by the plaintiffs against each defendant is one and the same. No variation of facts in any individual case is significant.

2. The absent defendant class members were adequately represented. As the District Court noted in its opinion, the Milwaukee County Corporation Counsel, which represented the named defendant, is experienced in conducting federal litigation. (A.J.S. 5-6). In addition, Attorney Joseph Salituro, Assistant Corporation Counsel for Kenosha County, Wisconsin, appeared and participated in defense of the Kenosha County Clerk in Leipzig v. Pallamolla, 418 F. Supp. 1073 (E.D. Wis. 1976),

a companion case to the case at bar which raised identical issues and was consolidated with the present case by order of the District Court. (A. 19). The Attorney General of the State of Wisconsin also took an active part in the defense of the named and unnamed defendant class members. (A. J. S. 6). The Wisconsin Attorney General is statutorily charged with the duty of representing the people of Wisconsin in certain civil and criminal cases. WIS. STAT. sec. 165.25, (1975).[27] Therefore, defendants were represented by counsel from three separate government offices, one of which has statewide responsibility to defend the laws of Wisconsin.

The District Court found at the conclusion of the case that the unnamed defendants had been adequately represented throughout the litigation, after all pleadings and briefs had been submitted and oral argument made. (A. J. S. 5-6).

Moreover, counsel opposed have not even suggested that their representation of the unnamed class members was less than adequate.

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[27]The provisions of 28 U. S. C. 2284 which were in effect at the time of the commencement of this action required that the Attorney General receive notice of any action involving the enforcement of a state statute. Pub. L. 86-507, sec. 1 (19); 74 Stat. 201. The notice requirement was complied with. The purpose of the provision was obviously to give state attorneys general an opportunity to defend the enactments of their legislatures.

The record both below and in this Court is barren of complaints by unnamed class members concerning the adequacy of representation, although each class member received a copy of the judgment. The conclusion is inescapable that the unnamed class members did receive adequate representation.

3. The statute in question is one of statewide applicability and reflects the judgment of the Wisconsin Legislature on a matter of state policy. The members of the defendant class have the duty to implement the statute in question because under Wisconsin law county clerks, and not state officials, are responsible for the issuance of marriage licenses. WIS. STAT. sec. 245.05 (1975). There is no local option not to enforce the law. The county clerks are simply acting as agents of the State when they refuse to issue marriage licenses under sec. 245.10 (1971). That being the case, representation of them by the Wisconsin Attorney General is not only adequate but most appropriate, for the Wisconsin Supreme Court has held that in Wisconsin,

> "It is the attorney general who should be afforded the opportunity to act in a representative capacity in behalf of the legislature and the people of the state to uphold the constitutionality of a statute of statewide application." City of Kenosha v. Dosemagen, 54 Wis. 2d 269, 195 N. W. 2d 462 (1972)

4. Defendant class members would have gained nothing by receiving notice. Defendants have not alleged in any of their arguments that they were prejudiced by the action of the District Court. They were not free to "opt out" under Fed. R. Civ. P. 23 (c) (3), this being a 23 (b) (2) class. The District Court ruled that they would not be allowed to intervene. (A. J. S. 9).

The case could not have been compromised without notice under 23(e). Therefore, defendants had nothing to gain by notice but the opportunity to raise arguments in defense of the constitutionality of the statute which had already been raised by the three attorneys representing them. One of the express purposes of the grant of discretion found in 23(d) is to give the court authority to limit redundant arguments. See, Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. at 41-42.

This Court has ruled that lower courts may handle procedural matters in a manner which will insure the orderly transaction of business and that such decisions are not reviewable by the Supreme Court absent a showing of substantial prejudice. American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970), citing NLRB v. Monsanto Chemical Co., 205 F.2d 763 (8th Cir. 1953). There is simply no such showing by the defendants here.[28]

Further, the Court has made clear that in analyzing whether the requirements of due process have been satisfied in any decision-making process, it will consider the fairness of the existing procedures and the probable value of additional safeguards against the administrative burden and other societal costs of requiring further procedural protections. Mathews v. Eldridge, 424 U.S. 319 (1976).

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[28]Were this Court to find that the District Court was in error in failing to notify unnamed defendants it is still bound to affirm absent a showing that the lower court's error substantially affected the rights of the defendants. 28 U.S.C. 2111.

Here, notice to the unnamed class members would have amounted to nothing more than a substantial administrative burden on an already overworked panel of three federal judges. See, Burger, C.J., Chief Justice Burger Issues Yearend Report, 62 A.B.A.J. 189 (February, 1976); Burger, C.J., Annual Report on the State of the Judiciary, 62 A.B.A.J. 443, 444-445 (April, 1976).

To summarize, it would seem that the Advisory Committee had the type of class which the defendants constitute in mind when it stated in its comments on Fed. R. Civ. P. 23(d)(2) that: "In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." Advisory Committee's Note, 39 F.R.D. 69, 106 (1966).

Finally, in their brief at 19, counsel opposed ask this Court to reverse the judgment of the District Court. Conceding for argument that notice should have been given to the unnamed defendants, plaintiffs submit that those parties who appeared would still be bound by the District Court's judgment and that it would be appropriate for this Court to vacate and remand only that part of the lower court's judgment which affects the class members who did not receive notice.

CONCLUSION

For the foregoing reasons, appellees respectfully move this Court to affirm the judgment of the District Court.

Respectfully submitted,

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Attorneys for Appellees

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May 5, 1977

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all persons similarly situated,

Appellants,

vs.

ROGER G. REDHAIL, individually and on behalf of all persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

SUPPLEMENTAL MEMORANDUM OF APPELLEES

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FOR ARGUMENT

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IN THE

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THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all persons similarly situated,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

SUPPLEMENTAL MEMORANDUM OF APPELLEES

QUESTION PRESENTED

I. Should the Court postpone argument in this case presently scheduled for October 4, 1977 in light of the action by the Wisconsin Legislature and the uncertain affect that action has upon this case?

STATEMENT OF THE CASE

This is a direct appeal from the final judgment and decree entered August 31, 1976, by order of a three-judge District Court, declaring WIS. STAT. sec. 245.10 (1), (4) and (5) (1973) unconstitutional and enjoining its enforcement. The case is scheduled for oral argument before this Court on October 4, 1977. This Supplemental Memorandum is submitted to advise the Court of recent action by the Wisconsin Legislature which may affect this case.

ARGUMENT

On September 20, 1977, the Wisconsin Legislature approved a comprehensive revision of the State's domestic relations code, 1977 Assembly Bill 100. The Wisconsin Assembly will consider a procedural motion on September 23, 1977, but it is expected that the code will be given final approval and be sent to Acting Governor Martin E. Schreiber for signature the week of September 26, 1977. Acting Governor Schreiber has stated his support of the legislation (see attached Exhibit A). Counsel for the Governor has informed counsel for appellees that the Governor is expected to sign the legislation during the week of September 29, 1977.

The legislation includes a new section, 245.105 (1977 Assembly Bill 100, sec. 3), a revision of sec. 245.10, the statute at issue in this case. A complete copy of proposed sec. 245.105 is attached as Exhibit B. The major changes from sec. 245.10 can be briefly summarized as follows: sec. 245.105 does not require

support-obligated parents of out of wedlock children to get permission to marry as did sec. 245.10; 245.105 requires the parent seeking permission to submit only proof of compliance with the support obligation and does not require proof that the child or children are not and are not likely to become public charges as does sec. 245.10; and sec. 245.105(3) gives the court authority to grant permission to marry to a person who has not complied with the prior support order if clear and convincing proof is submitted that he or she was for reasonable cause unable to comply.

The new sec. 245.105 will not become effective automatically however, section 245.105 (8) states:

> "This section is independent of s. 245.10 and shall be enforced only when the provisions of s. 245.10 and utilization of the procedures thereunder are stayed or enjoined by the order of any court."

Section 245.105 (8) appears to mean that if any court, state or federal, enters an order enjoining the enforcement of sec. 245.10, sec. 245.105 is to automatically go into effect and be enforced statewide. If any court has entered a final unappealed order enjoining the enforcement of sec. 245.10, then this case may very well be moot because the representative plaintiff would no longer be required to obtain court permission to marry, and because the law in question would have undergone substantial changes. See Kremens v. Bartley, 45 U.S.L.W. 4451 (dec'd. May 16, 1977). Wisconsin lower court decisions and orders are unpublished. Appellees do not know and cannot immediately ascertain whether any lower state court has entered an order on either State or federal

constitutional ground staying or enjoining sec. 245.10, nor do they know if any action seeking such relief is currently pending. However, appellees are aware of one state court decision that ruled the "public charges" provision of the statute in question to be constitutionally infirm. A copy of the order entered in the case is attached as Exhibit C.

CONCLUSION

This memorandum is submitted primarily for the Court's information. Appellees request that the Court consider postponing oral argument in this case because they have serious doubt that the effect of the legislation on this case can be ascertained by October 4, 1977.

Respectfully submitted,

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APPENDIX

EXHIBIT A

Wheeler News Service, Inc.
P.O. Box 488
Madison, Wis. 53701
(608) 837-9490

THE WHEELER REPORT

* * *

ON OTHER SPECIFICS BEFORE THE LEGISLATURE IN SEPTEMBER, Mr. Schreiber feels that the "no-fault divorce" bill now pending is one of the "most misunderstood and misnamed issues" before the Legislature. For all "practical purposes," Mr. Schreiber said, "present divorce laws..especially provisions for divorces on the grounds of cruel and inhuman treatment are so loosely interpreted that almost anybody can get a divorce for any reason." The bill before the legislature (AB 100) "has the potential of helping many people." It could "assist them in recovering from very unhappy experiences with as little acrimony developing as possible."

* * *

EXHIBIT B

SECTION 3. 245.105 of the statutes is created to read:

245.105 PERMISSION OF COURT REQUIRED FOR CERTAIN REMARRIAGES. (1) No Wisconsin resident having minor issue of a prior marriage not in his or her custody and which he or she is under obligation to support by any court order or judgment,

may remarry, in this state or elsewhere, without the order of either the court of this state which granted the judgment or support order, or the court having divorce jurisdiction in the county of this state where the minor issue resides or where the marriage license application is made. No marriage license may be issued to any such resident except upon court order. The court, within 5 days after permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow the petitioner to submit proof of compliance with the previous court obligation. No such order may be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of the minor issue is given notice of the proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown. A 5-day notice of the hearing shall be given to the family court commissioner of the county where permission is sought, who shall attend the hearing, and to the family court commissioner of the court which granted the divorce order or judgment. If the divorce order or judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if the petitioner submits proof of compliance with all such previous court obligations the court shall grant the order, a copy of which shall be filed in any previous marital court action of such petitioner in this state affected thereby; otherwise permission for a license shall be with held until such proof is submitted, but any court order withholding such permission is an appealable order. Any hearing under this section

may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by the petitioner of all financial resources that the petitioner has complied with previous court orders or judgments applicable to the support of minor children. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting the marriage is filed with said county clerk.

(2) No nonresident of this state, having minor issue of a prior marriage not in his or her custody and which he or she is under obligation to support by order or judgment of any court in this state or elsewhere, may marry in this state unless he or she has complied with the requirements of sub. (1).

(3) The requirements of subs. (1) and (2) shall establish a rebuttable statutory presumption that a remarriage by any parent who is obligated by court order or judgment to provide support for any child not in his or her custody may substantially affect that child's right of support. Such presumption may be overcome by sufficient contrary proof submitted to the court. Notwithstanding subs. (1) and (2), permission to remarry may likewise be granted to any petitioner who submits clear and convincing proof to the court that for reasonable cause he or she was not able to comply with a previous court obligation for child support.

(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, the resident must, prior to such marriage, obtain permission of the

court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

(5) This section shall have extraterritorial effect outside the state; and s. 245.04 (1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.

(6) This section shall not apply to any party described in sub. (1) or (2) who applies for a license to remarry the parent of the child or children whom that party is under court obligation to support, provided said party is not likewise under court obligation to support any other child.

(7) Any person who obtains a marriage license contrary to or in violation of this section, whether such license is obtained by misrepresentation or otherwise, or whether such marriage is entered into in this state or elsewhere, shall be fined not less than $200 nor more than $1,000, or imprisoned not more than one year in the county jail, or both.

(8) This section is independent of s. 245.10 and shall be enforced only when the provisions of s. 245.10 and utilization of the procedures thereunder are stayed or enjoined by the order of any court.

EXHIBIT C

ORDER GRANTING PERMISSION TO RE-MARRY PURSUANT TO HEARING ON NOTICE TO CUSTODIAN OR MINOR CHILDREN AND TO FAMILY COURT COMMISSIONER.
(Formal Parts Omitted)

The verified petition of the above named petitioners coming on for adjourned hearing to the Family Court Branch of Winnebago County, Wisconsin, on the 18th day of July, 1974, pursuant to personal service of said petition and of the order for hearing thereon dated at least five (5) days before the initial date set for hearing upon Nadine T. Gall, the custodian of Stephen L. Luebke, Jr., Timothy T. Luebke, Melissa M. Luebke, Douglas A. Luebke, and Elizabeth E. Luebke, the minor children of the petitioner, Stephen L. Luebke, for whose support he is liable, and upon the Family Court Commissioner of this Court and upon the Winnebago County Department of Social Services.

And said petitioners appearing in person and by Nicholas J. Meeuwsen, one of their attorneys, and the other appearances being as follows: Nadine T. Luebke Gall in person and by her attorney Thomas Hughes; Silas L. Spengler, Winnebago County Family Court Commissioner; and Assistant District Attorney Robert VanderLoop on behalf of the Winnebago County Department of Social Services.

And the Court having taken testimony from which it satisfactorily appears that the said petitioner, Stephen L. Luebke, is not in default in the payments he is under order to make for the support of his minor children.

And the Court having heard testimony that said minor children are now public charges within the purview of Wisconsin Statutes, Section 245.10, by reason of a step-parent grant made by the aforesaid Winnebago County Department of Social Services to said Nadine T. Luebke Gall.

NOW THEREFORE, on motion of Nicholas J. Meeuwsen, one of the attorneys for said petitioners:

IT IS DETERMINED AND ORDERED:

1. That the provisions of Wisconsin Statutes, Section 245.10, are unconstitutional as applied to petitioner, Stephen L. Luebke, because of the requirements thereof, deny said petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States and Article 1, Section 1, of the Constitution of the State of Wisconsin.

2. That therefore, the County Clerk of said County is authorized to receive the Application for Marriage of said petitioners and to process the same and issue a license as provided by law.

Dated this 26 day of July, 1974.

BY THE COURT:

/s/ Thomas S. Williams
Judge Thomas S. Williams

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all other persons similarly situated,

Appellant,

v.

ROGER G. REDHAIL, individually and on behalf of all other persons similarly situated,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

[redacted] THE WISCONSIN CIVIL LIBERTIES UNION FOUNDATION, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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IN THE

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October Term, 1976

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Appellant,

v.

ROGER G. REDHAIL, individually and on behalf of all other persons similarly situated,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION OF THE WISCONSIN CIVIL LIBERTIES UNION FOUNDATION, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Wisconsin Civil Liberties Union Foundation, Inc., respectfully moves, pursuant to Rule 42 of this Court's rules, to file the within brief *amicus curiae*. Counsel for appellants and appellees have consented to the filing of this brief.

The Wisconsin Civil Liberties Union Foundation, Inc. is a private, nonprofit foundation engaged solely in the defense of the Bill of Rights. It is an affiliate of the American Civil Liberties Union. During its history, the Foundation has devoted substantial effort to protecting the rights guaranteed by the United States Constitution. The parties by their attorneys have consented to the filing of an amicus curiae brief by the Wisconsin Civil Liberties Union Foundation, Inc.

Attorney Terry W. Rose, one of the authors of this brief, also represented the plaintiffs in a case entitled *Vernon T. Leipzig, Jr. and Veralyn Randall v. Ruth Pallamolla* in the United States District Court for the Eastern District of Wisconsin, Civil Action File No. 74-C-623. *Leipzig et al vs. Pallamolla* was a campanion case decided the same day as *Redhail vs. Zablocki,* 418 F. Supp. 1061 (1976). Leipzig and Randall also commenced an action in the United States District Court for the Eastern District of Wisconsin under 42 U.S.C. Section 1983 challenging the constitutionality of Wisconsin Statutes section 245.10 (1973). The U.S. District Court for the Eastern District of Wisconsin decided that plaintiffs Leipzig and Randall were members of the plaintiff class in *Redhail vs. Zablocki,* Supra, and were entitled to relief as members of the plaintiff's class in *Redhail. Leipzig and Randall vs. Pallamolla* was dismissed as moot on August 31, 1976.

In this brief we demonstrate the broad scope and applicability of section 245.10 (1), (4), and (5), Wisconsin Statutes as applied to a non-indigent person, Vernon T. Leipzig, Jr., who complied with the judgment of divorce and paid child support as required by that judgment. This brief also demonstrates the effect of

Section 245.10 (1), (4) and (5) on Veralyn Randall, Mr. Leipzig's fiance at the time this action was commenced and later his wife during the pendency of their lawsuit.

Respectfully submitted,

/s/ William H. Lynch
William H. Lynch
Wisconsin Civil Liberties Union
Foundation, Inc.
1840 North Farwell Avenue
Milwaukee, Wisconsin 53202

Attorney for Amicus Curiae

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all other persons similarly situated,

Appellant,

v.

ROGER G. REDHAIL, individually and on behalf of all other persons similarly situated,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF THE WISCONSIN CIVIL LIBERTIES UNION FOUNDATION, INC., AMICUS CURIAE

INTEREST OF AMICUS

The interest of *amicus* appears from the foregoing motion.

WISCONSIN STATUTE INVOLVED

Section 245.10(1), (4) and (5). Wis. Stats.

"245.10 Permission of court required for certain marriages. (1) No Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment, may marry in this state or elsewhere, without the order of either the court of this state which granted such judgment or support order, or the court having divorce jurisdiction in the county of this state where such minor issue resides or where the marriage license application is made. No marriage license shall be issued to any such person except upon court order. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow said person to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of such minor issue is given notice of such proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the court upon good cause shown, and, if the minor issue were of a prior marriage, unless a 5-day notice thereof is given to the family court commissioner of the county where such permission is sought, who shall attend such hearing, and to the family court commissioner of the court which granted such divorce judgment. If the divorce judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if said person submits such proof and makes a showing that such children are not then and are not likely thereafter to become public

charges, the court shall grant such order, a copy of which shall be filed in any prior proceeding under s.52.37 or divorce action of such person in this in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by said person of his financial resources that the latter has complied with prior court orders or judgments affecting his minor children, and also has shown that such children are not then and are not likely thereafter to become public charges. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting such marriage is filed with said county clerk.

* * *

(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, he must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present. (5) This section shall have extraterritorial effect outside the state; and s.245.04(1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere."

ARGUMENT

I. Section 245.10 (1), (4) And (5) Wisconsin Statutes Prohibits Marriage By A Nonindigent, Working Person Who Has Met All Court Imposed Requirements For Support Of Children Of A Previous Marriage Who Are Nonetheless On Welfare.

The *Leipzig et al vs. Pallamolla* case was submitted to the United States District Court on a stipulation of facts. Vernon T. Leipzig, Jr. was previously married to Theresa M. Leipzig. Their marriage was terminated by a judgment of divorce in Kenosha County Court, Kenosha County, Wisconsin on May 24, 1974. Mr. Leipzig had the obligation to support four minor children of that marriage. His four minor children were in the custody of his ex-wife. The divorce judgment required him to pay child support in the amount of $60 per week. The divorce judgment did not award alimony to Leipzig's ex-wife. Vernon T. Leipzig, Jr. petitioned the County Court, Branch 2, Kenosha County, Wisconsin, pursuant to Section 245.10(1) of the Wisconsin Statutes for permission to marry Veralyn Randall. Ms. Randall signed said petition wherein she stated that she was engaged to be married to Mr. Leipzig. This petition was heard before the County Court on December 13, 1974. Mr. Leipzig's ex-wife signed an affidavit which was filed with the County Court stating that Mr. Leipzig was not in default of payment of child support as ordered by the Kenosha County Court for the support of

their minor children and she consented to an immediate hearing and that an order issue granting Leipzig's petition to remarry without her objection.

On December 13, 1974 Mr. Leipzig's ex-wife received welfare assistance pursuant to the A.F.D.C. program for the support and maintenance of herself and the parties' four minor children. She received a check solely for the support of the four minor children in the amount of $355.00 per month. Since Mr. Leipzig's ex-wife had remarried she did not receive any money for herself under the A.F.D.C. program. Since she had the custody of the four minor children she was not required by Section 245.10, Wisconsin Statutes, to obtain court permission to remarry. The right to support payments of $60.00 per week being made by Mr. Leipzig pursuant to the divorce judgment had been assigned to the Kenosha County Department of Health and Social Services by the former Mrs. Leipzig. Mr. Leipzig paid the child support out of his income he received as a deputy sheriff for Kenosha County, Wisconsin. The Kenosha County Court denied the application of Mr. Leipzig for permission to marry Ms. Randall pursuant to Section 245.10 of the Wisconsin Statutes for the reason that the four minor children of Mr. Leipzig were receiving public welfare even though Mr. Leipzig was current in the payment of all court ordered child support. Therefore, Mr. Leipzig and Ms. Randall were unable to obtain a valid marriage license from County Clerk Ruth Pallamolla or any other county clerk in the state of Wisconsin for the reason that they were unable to satisfy the requirements of Section 245.10.

During the pendency of the *Leipzig et al vs. Pallamolla* case in the U.S. District Court for the

Eastern District of Wisconsin Vernon T. Leipzig and Veralyn Randall married in Antioch, Illionois. Also during the pendency of that action Mrs. Leipzig became pregnant and a child was born.

II. Section 245.10 (1), (4) And (5) Wisconsin Statutes Is An Unconstitutional Infringement On The Fundamental Right To Marry.

The State of Wisconsin in adopting Section 245.10 (1), (4) and (5) Wisconsin Statutes has infringed on the fundamental right to marry. It prohibits people like Vernon T. Leipzig, Jr. and Veralyn Randall from legally marrying in Wisconsin solely because his children by his former marriage are receiving public welfare. Even though Mr. Leipzig married Veralyn Randall in Antioch, Illinois that marriage is void according to Wisconsin Statute, Section 245.10(5). The statute applies to all Wisconsin residents having minor issue not in that person's custody in which that person is under an obligation to support by any court order or judgment. Thus the marriage of Vernon T. Leipzig, Jr. in Antioch, Illinois is a void marriage and the child born to them illegitimate.

Marriage is a basic right guaranteed by the First and Fourteenth Amendments to the United States Constitution. In *Griswold vs. Connecticut,* 381 U.S. 479, 14 L.Ed. 2d 510, 516 (1965), the United States Supreme Court stated that marriage "is an association for as noble a purpose as any involved in our prior decisions." In *Loving vs. Virginia,* 388 U.S. 1, 18 L.Ed. 2d, 1010, 1018 (1967) the Supreme Court stated "The freedom to

marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival. *Skinner vs. Oklahoma,* 316 U.S. 535, 541, 86 L.Ed. 1655, 1660, 62 S.Ct. 1110 (1942)." In other words the United States Supreme Court has recognized that the right to marry existed prior to our Constitution. It is one of the basic civil rights of all people. In *Meyer vs. Nebraska,* 262 U.S. 390, 67 L.Ed. 1042, 1045 (1923) Justice McReynolds defined the liberty guaranteed by the Fourteenth Amendment. He wrote "Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." On these and other occasions the United States Supreme Court has recognized the fundamental importance of the marital relationship under our Constitution. See also *Skinner vs. Oklahoma,* 316 U.S. 535, 86 L.Ed. 1655, 1660 (1942); *Eisenstadt vs. Baird,* 405 U.S. 438, 31 L.Ed. 2d 349 (1972); *Boddie vs. Connecticut,* 401 U.S. 371, 374, 28 L.Ed. 2d 113 (1971); *United States vs. Kras,* 409 U.S. 434, 34 L.Ed. 2d 626 (1973).

The right to marry is "imbedded in the First Amendment." And the United States Supreme Court regards it as "fundamental" and requires "the lofty requirement of a compelling governmental interest before (it) may be significantly regulated." *United States vs. Kras,* 409 U.S. 434, 446, 34 L.Ed. 2d 626, 636

(1973). The State of Wisconsin has contended that Section 245.10 Wisconsin Statutes encourages ex-spouses to increase their child support payments so that their children will not receive public welfare and further will pay any support arrearages accrued during periods of non-payment. However, there are other means to compel payment by a non-paying person who is under an obligation to support his minor children. These other methods of compelling support do not infringe upon the fundamental right to marry. A Wisconsin trial court can order a wage assignment for the spouse who fails to comply with payment of support. Section 247.265, Wisconsin Statutes. Section 247.37 (1) (a), Wisconsin Statutes, further provides that disobedience of a court judgment with respect to payment of alimony or support is punishable under Section 295.03, Wisconsin Statutes, by commitment to the county jail or house of correction until such judgment is complied with and the costs and expenses of the proceeding are paid or until the party committed is otherwise discharged according to law. This is the traditional contempt proceeding under Chapter 295 of the Wisconsin Statutes. Without Section 245.10 (1), (4) and (5), Wisconsin Statutes, the State of Wisconsin and persons who have custody of minor children have strong tools at their disposal to require a non-paying ex-spouse to support a family. These strong tools do not infringe upon the fundamental right of marriage.

The sweep of Section 245.10 (1), (4) and (5), Wisconsin Statutes, is too broad. It penalizes one like Vernon T. Leipzig, Jr. who has complied with the divorce judgment by paying the court ordered child support of $60 per week at the time that he petitioned the County Court to marry on December 13, 1974. The

$60 per week may be insufficient to support the four minor children by his prior marriage but it is the sum that was ordered by the County Court in the divorce judgment. The State of Wisconsin cannot show a sufficient countervailing justification for prohibiting the marriage of Vernon T. Leipzig, Jr. and Veralyn Randall and other cases where minor children by a prior marriage are being supported by public welfare in light of the fact that there are available to the State of Wisconsin less restrictive means of collecting support which do not interfere with the constitutionally guaranteed right of marriage.

The breadth and scope of Section 245.10 (5), Wisconsin Statutes, is demonstrated by Mr. Leipzig when he entered into a void marriage in Antioch Illinois with Veralyn Randall. Since the marriage is void, the child born to them is also illegitimate. The statute therefore not only affects the person who has complied with court ordered support but it affects Ms. Randall and now their child.

III. Section 245.10 (1), (4) and (5), Wisconsin Statutes, Denies Equal Protection Of The Laws As Guaranteed By The Fourteenth Amendment.

The challenged Wisconsin Statutes prohibit Vernon T. Leipzig from marrying because his children by a prior marriage are receiving public welfare. We contend that the applicability of Section 245.10 (1), (4) and (5), Wisconsin Statutes, denies equal protection of the laws as guaranteed by the Fourteenth Amendment. "The reach of the equal protection clause is not definable

with mathematical precision. But in spite of doubts by some, as it has been construed, rather definite guidelines have been developed; race is one ... alienage is another ... religion is another ... poverty is still another (*Griffin vs. Illinois,* Supra); and class or caste is yet another (*Skinner vs. Oklahoma,* 316 U.S. 535)." *Boddie vs. Connecticut,* 410 U.S. 371, 385 (1971) Justice Douglas concurring. For members of the appellee class such as Vernon T. Leipzig the invidious discrimination is based on relative poverty. The affluent can marry but the hard working nonindigent law enforcement officer who has done all the divorce court has required cannot. In *Griffin vs. Illinois,* 351 U.S. 12, 100 L.Ed. 891, 898 (1956) the Supreme Court ruled "In criminal trials the state can no more discriminate on account of poverty than on account of religion, race or color." Likewise we contend in marriage the State can no more discriminate on account of poverty than on account of religion, race or color." See also *Loving vs. Virginia,* 388 U.S. 1, (1967); *Williams vs. Illinois,* 399 U.S. 235, 241 (1970). The gravamen of our claim is total deprivation of Leipzig and Randall's right to marry. Section 245.10 (1), (4) and (5), Wisconsin Statutes, totally bars their marriage so long as his children are receiving public welfare or likely to receive it. *c.f. Sosna vs. Iowa,* 419 U.S. 393, 42 L. Ed. 2nd 532 (1975). In the case of persons unable to pay sufficient support to prevent children not in their custody from becoming public charges, the Wisconsin Statutes Section 245.10 (1), (4) and (5) is an unconstitutional discrimination against the poor who are deprived of the basic constitutional right to marry.

CONCLUSION

For the reasons set forth above, the decision below should be affirmed.

Respectfully submitted,
/s/ Terry W. Rose
TERRY W. ROSE
/s/ William H. Lynch
WILLIAM H. LYNCH

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APPENDIX

APPENDIX INDEX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STIPULATED FACTS

VERNON T. LEIPZIG, JR. and VERALYN RANDALL,

Plaintiffs,

vs.

EDWARD J. WAVRO, Individually and as County Clerk for Kenosha County, Wisconsin,

Defendant.

Case No. 74-C-263

It is stipulated and agreed by and between the parties above named by their respective undersigned attorneys that the following facts are stipulated to by the parties by their attorneys for consideration by the court in the above entitled matter:

1. Plaintiffs are adult residents of Kenosha County, State of Wisconsin. Plaintiff Vernon T. Leipzig, Jr. is employed as a deputy sheriff for Kenosha County, Wisconsin.

2. Defendant is county clerk for Kenosha County, Wisconsin and resides in Kenosha, Wisconsin.

3. Defendant in his capacity as county clerk for Kenosha County, Wisconsin, is responsible for the issuance of marriage licenses in Kenosha County, Wisconsin, pursuant to Section 245.05 of the Wisconsin Statutes.

4. Plaintiff Vernon T. Leipzig, Jr. was previously married to Theresa M. Leipzig of Kenosha County, Wisconsin and that marriage was terminated by a judgment of divorce which was granted on May 24, 1974 in County Court for Kenosha County, Wisconsin. The plaintiff, Vernon T. Leipzig, Jr. has the obligation to support the following minor children of said marriage and that said children are not in his custody and in the custody of his ex-wife, Theresa M. Leipzig, now known as Theresa M. Kuchinski:

	Age	*Birthdate*
Kim Leipzig	9	September 18, 1965
Keith Leipzig	4	February 26, 1970
Karla Leipzig	6	December 28, 1968
Kelly Leipzig	3	June 14, 1972

5. Plaintiff Vernon T. Leipzig, Jr. was ordered by the County Court for Kenosha County, Wisconsin to pay $60.00 per week as child support for the support and maintenance of the four minor children in his ex-wife's custody. The divorce judgment did not award alimony to the ex-wife of the plaintiff, Vernon T. Leipzig, Jr.

6. Plaintiff Vernon T. Leipzig, Jr. petitioned the County Court, Branch 2, Kenosha County, Wisconsin pursuant to Section 245.10 (1) of the Wisconsin Statutes for permission to marry plaintiff Veralyn Randall. Plaintiff Veralyn Randall signed said petition wherein she stated that she was engaged to be married to plaintiff Vernon T. Leipzig, Jr. Said petition was heard by the Honorable John J. Crosetto, Kenosha County judge, on December 13, 1974 at 8:30 A.M. Plaintiff Vernon T. Leipzig, Jr.'s ex-wife signed an affidavit

which was filed with the Kenosha County Court stating that the plaintiff, Vernon T. Leipzig, was not in default of payment of child support as ordered by the Kenosha County Court for the support of their minor children and she consented to an immediate hearing and further that an order may issue for plaintiff Vernon T. Leipzig, Jr.'s remarriage without her objection.

7. That when plaintiff Vernon T. Leipzig, Jr. petitioned the Kenosha County Court for permission to marry on December 13, 1974 he was not in default in payment of his child support of $60.00 per week.

8. That on December 13, 1974 plaintiff Vernon T. Leipzig, Jr.'s ex-wife received welfare assistance pursuant to the A.F.D.C. program for the support and maintenance of herself and the parties' four minor children. Presently plaintiff Vernon T. Leipzig, Jr.'s ex-wife receives a check solely for the support of the four minor children under the A.F.D.C. program, said sum of support for the children being $355.00 per month. Since plaintiff Vernon T. Leipzig, Jr.'s ex-wife has remarried she does not receive any money for herself under the A.F.D.C. program.

9. The right to support payments of $60.00 per week being made by plaintiff Vernon T. Leipzig, Jr. Pursuant to the divorce judgment aforementioned has been assigned to the Kenosha County Department of Health and Social Services.

10. That following the hearing before the County Court, Branch 2, Kenosha County, Wisconsin on December 13, 1974 the Court denied the application of plaintiff Vernon T. Leipzig, Jr. for permission to marry plaintiff Veralyn Randall pursuant to Section 245.10 of the Wisconsin Statutes for the reason that the four

minor children of plaintiff Vernon T. Leipzig, Jr. are receiving public welfare.

11. The plaintiffs are unable to obtain a valid marriage license from defendant or any other county clerk in the State of Wisconsin for the reason that they are unable to satisfy the requirement of Section 245.10.

Dated at Kenosha, Wisconsin this 20th day of February, 1975.

COTTON, ROSE & ROSE
By */s/ Terry W. Rose*
Terry W. Rose
Attorneys for Plaintiffs

/s/ Joseph Salituro
Joseph Salituro
Attorney for Defendant

Dated at Madison, Wisconsin this 21st day of February, 1975.

/s/ Ward Johnson
Ward Johnson,
Assistant Attorney General for
the State of Wisconsin, of
counsel for defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

VERNON T. LEIPZIG, JR.
and VERALYN RANDALL,

Plaintiffs,

vs

RUTH PALLAMOLLA,

Defendant.

Civil Action
No. 74-C-623

ORDER

Before TONE, Circuit Judge, and REYNOLDS and WARREN, District Judges.

This is an action brought under 42 U.S.C. 1983 challenging the constitutionality of a Wisconsin statute, Section 245.10 (1973), which requires certain Wisconsin residents to obtain court permission before they can marry. In a companion case decided this day, *Redhail v. Zablocki*, C.A. No. 74-C-624 (E.D. Wis.), we held Section 245.10 (1), (4), and (5) unconstitutional under the equal protection clause of the Fourteenth Amendment. There we defined the plaintiff class as follows:

> "All Wisconsin residents who have minor issue not in their custody and who are under an obligation to support such minor issue by any court order or judgment and to whom the county clerk has refused to issue a marriage license without a court order, pursuant to Section 245.10 (1), Wis. Stats. (1971)."

Because plaintiffs in this action fit the above description and are entitled to relief as members of the plaintiff's class in *Redhail*, this individual action is hereby dismissed as moot.

Dated at Milwaukee, Wisconsin this 31st day of August, 1976.

/s/ Philip W. Tone
Philip W. Tone, Judge of the U.S.
Court of Appeals for the
Seventh Circuit

/s/ John W. Reynolds
John W. Reynolds, Chief Judge,
U.S. District Court

/s/ Robert W. Warren
Robert W. Warren, Judge,
U.S. District Court

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

VERNON T. LEIPZIG, JR. AND
VERALYN RANDALL,

Plaintiffs

JUDGMENT

vs.

74-C-623

RUTH PALLAMOLLA,

Defendant

JUDGMENT

This action came on for hearing before the court, Honorable Philip W. Tone, John W. Reynolds, Robert W. Warren, judges, presiding, and a decision having been duly rendered.

It is Ordered and Adjudged: that the above-entitled action is hereby dismissed.

Dated at Milwaukee, Wisconsin, this 31st day of August, 1976.

/s/Ruth W. LaFave
Clerk of Court

IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all persons similarly situated,
Appellants,

v.

ROGER G. REDHAIL, individually and on behalf of all persons similarly situated,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

SUPPLEMENTAL MEMORANDUM OF APPELLANTS AND APPELLEES

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QUESTION PRESENTED

I. Does new legislation passed by the Wisconsin Legislature and signed by the Acting Governor have any affect on the issues in this case?

STATEMENT OF THE CASE

This is a direct appeal from the final judgment entered August 31, 1976, by order of a three-judge district court, declaring WIS. STAT. §245.10(1), (4) and (5) (1973) unconstitutional and enjoining its enforcement. Oral argument was heard by this Court on October 4, 1977. At argument, the Court directed the parties to inform the Court when the Acting Governor signed legislation which had been passed by the Wisconsin Legislature, and ordered the parties to submit supplemental memoranda discussing the effect of the new legislation on the present case. Because the parties agree that the new legislation has no effect on this case, this memorandum is submitted by both appellants and appellees.

ARGUMENT

On October 10, 1977, Acting Governor Martin E. Schreiber signed into law a comprehensive revision of Wisconsin laws relating to divorce. This new legislation, Chapter 105, Wisconsin Laws of 1977, will become effective February 1, 1978.

The new legislation does not repeal, amend or modify in any way the present sec. 245.10, the "permission to marry" statute at issue in this case. It does create new section 245.105 which is basically a fall-back "permission to marry" statute affecting a somewhat smaller group of people and applying different standards for the granting or withholding of permission to marry. A copy of the first portions of this law including sec. 245.105 is attached as Exhibit A. Section 245.105 will not become effective automatically, however. Section 245.105(8) states:

> "This section is independent of sec. 245.10 and shall be enforced only when the provisions of sec. 245.10 and utilization of the procedures thereunder are stayed or enjoined by the order of any court."

If on or after February 1, 1978, sec. 245.10 is stayed or enjoined by the order of any court, then 245.105 will become effective. If sec. 245.10 is not stayed or enjoined by the order of any court, then sec. 245.10 will remain in effect and 245.105 will not be enforced.

The parties have investigated and have not learned of any pending or completed case in any other court where an injunction against the enforcement of sec. 245.10 has been requested or issued. Moreover, the Attorney General has not been notified of any such action. See Exhibit B attached. Notice to the Attorney General of a declaratory judgment action questioning the constitutionality of a state statute is required in federal cases by 28 U.S.C. §2284(2) and in state cases by sec. 806.04(11), WIS. STATS. (1975). The Wisconsin Supreme Court has strongly suggested notice to the Attorney General where the constitutionality of a state statute is questioned in other state proceedings. *City of Kenosha v. Dosemagen*, 54 Wis. 2d 264, 195 N.W. 2d 462 (1972).

The parties submit that this case is not moot and that the new legislation has no effect on the issues herein. If this Court reverses the district court and vacates the injunction, then 245.10 will again be enforced. If this Court affirms the judgment of the district court, then the injunction will remain in effect and 245.10 will not be enforced. Only then would the new legislation become effective.

The new Wisconsin legislation is analogous to the Texas filing fee legislation enacted in response to a federal injunction against the enforcement of the previous statute and discussed by the Court on appeal in *Bullock v. Carter*, 405 U.S. 135, 141 n. 17. Texas enacted a "contingent, temporary law" which was to go into effect only for one year and only if this Court affirmed or refused to review the judgment of the district court or had not yet disposed of the appeal by a certain date. The Court stated that this sort of change of law did not render the case moot because the lower court's injunction would have effect after the year had expired and because there was a continuing controversy with respect to payment of filing fees for an earlier election. While the Wisconsin Legislature chose a slightly different method, its intention and the effect of the legislation are clearly the same as in the Texas case, i.e., to enact a law the effect of which will be contingent upon this Court's decision in this case. Moreover, there is a continuing controversy about the validity of marriages entered into in violation of the existing statute. As in *Bullock*, the new legislation is not before the Court (except for the limited purpose of the instant inquiry); the need to resolve the issues in this case has not been obviated.

CONCLUSION

Appellants and appellees urge the Court to decide this case on the merits.

Dated this 21st day of October, 1977.

Respectfully submitted,

WARD L. JOHNSON, JR.
JOHN R. DEVITT

Attorneys for Appellants

ROBERT H. BLONDIS
PATRICIA NELSON

Attorneys for Appellees

EXHIBIT A

STATE OF WISCONSIN

1977 Assembly Bill 100 **Date published*:** October 15, 1977

CHAPTER 105, LAWS OF 1977

AN ACT to repeal 247.02, 247.03 (2), 247.055 to 247.066, 247.101, 247.11, 247.15, 247.18, 247.232, 247.33, 247.34, 247.37 (4) and 247.375; to renumber 247.03 (1) and (3) and 247.19; to renumber and amend 247.12, 247.24 (1) (c) and (2) and 247.32; to amend 59.42 (2) (b), 245.12 (1), 247.02 (1) (f) and (g) as renumbered, 247.045, 247.08 (1), 247.082, 247.10, 247.125, 247.14, 247.22 (1), 247.23 (1) and (2), 247.30, 247.37 (title) and (1) to (3), 247.38, 251.72 (1) and 801.05 (11); to repeal and recreate 247.05, 247.07, 247.081, 247.085, 247.09, 247.21, 247.24 (title) and (1) (a) and (b), 247.245, 247.25, 247.26 and 247.265; and to create 245.105, 247.02 (1) (i), (j) and (k), 247.03, 247.083, 247.12 (2), 247.19 (2), 247.24 (1) (c) and (d) and (lm), 247.255, 247.261, 247.262, 247.263, 247.27, 247.275, 247.305, 247.32 (3) and 632.895 of the statutes, relating to revision of laws applicable to actions affecting marriage.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

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* Section 990.05, *1975 Wisconsin Statutes:* **Laws and acts; time of going into force.** "Every law or act which does not expressly prescribe the time it takes effect shall take effect on the day after its publication."

SECTION 1. **Purpose.** (1) It is the intent of the legislature to emphasize the present and future needs of the parties to actions affecting marriage and of their children, if any; to move away from assigning blame for a marriage failure; and to promote the settlement of financial and custodial issues in a way which will meet the real needs of all concerned persons as nearly as possible.

(2) It is the intent of the legislature that a spouse who has been handicapped socially or economically by his or her contributions to a marriage shall be compensated for such contributions at the termination of the marriage, insofar as this is possible, and may receive additional education where necessary to permit the spouse to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. It is further the intent of the legislature that the standard of living of any minor children of the parties be maintained at the level the children would have enjoyed had the marriage not ended, so that insofar as is possible, the children will not suffer economic hardship. It is the intent of the legislature to recognize children's needs for close contact with both parents, to encourage joint parental responsibility for the welfare of minor children and to promote expanded visitation.

(3) It is the intent of the legislature that maintenance payments shall have the same effect for tax purposes as did alimony as provided for in chapter 247, 1975 statutes.

(4) This act is not intended to make a divorce, annulment or legal separation easier to obtain. Its sole purpose is to promote an equitable and reasonable adjudication of the economic and custodial issues involved in marriage relationships.

SECTION 2. 59.42 (2) (b) of the statutes is amended to read:

59.42 (2) (b) All special proceedings independent of an action taken at the instance and for the benefit of one party without notice to or contest by any person adversely interested; and any proceeding under s. 245.10 *or 245.105* for court permission to marry, $4.

SECTION 3. 245.105 of the statutes is created to read:

245.105 Permission of court required for certain remarriages. (1) No Wisconsin resident having minor issue of a prior marriage not in his or her custody and which he or she is under obligation to support by any court order or judgment, may remarry, in this state or elsewhere, without the order of either the court of this state which granted the judgment or support order, or the court having divorce jurisdiction in the county of this state where the minor issue resides or where the marriage license application is made. No marriage license may be issued to any such resident except upon court order. The court, within 5 days after permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow the petitioner to submit proof of compliance with the previous court obligation. No such order may be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of the minor issue is given notice of the proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the party affected or by the court upon good cause shown. A 5-day notice of the hearing shall be given to the

family court commissioner of the county where permission is sought, who shall attend the hearing, and to the family court commissioner of the court which granted the divorce order or judgment. If the divorce order or judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if the petitioner submits proof of compliance with all such previous court obligations the court shall grant the order, a copy of which shall be filed in any previous marital court action of such petitioner in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by the petitioner of all financial resources that the petitioner has complied with previous court orders or judgments applicable to the support of minor children. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting the marriage is filed with said county clerk.

(2) No nonresident of this state, having minor issue of a prior marriage not in his or her custody and which he or she is under obligation to support by order or judgment of any court in this state or elsewhere, may marry in this state unless he or she has complied with the requirements of sub. (1).

(3) The requirement of subs. (1) and (2) shall establish a rebuttable statutory presumption that a remarriage by any parent who is obligated by court order or judgment to provide support for any child not in his or her custody may substantially affect that child's right of

support. Such presumption may be overcome by sufficient contrary proof submitted to the court. Notwithstanding subs. (1) and (2), permission to remarry may likewise be granted to any petitioner who submits clear and convincing proof to the court that for reasonable cause he or she was not able to comply with a previous court obligation for child support.

(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, the resident must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

(5) This section shall have extraterritorial effect outside the state; and s. 245.04 (1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.

(6) This section shall not apply to any party described in sub. (1) or (2) who applies for a license to remarry the parent of the child or children whom that party is under court obligation to support, provided said party is not likewise under court obligation to support any other child.

(7) Any person who obtains a marriage license contrary to or in violation of this section, whether such license is obtained by misrepresentation or otherwise,

or whether such marriage is entered into in this state or elsewhere, shall be fined not less than $200 nor more than $1,000, or imprisoned not more than one year in the county jail, or both.

(8) This section is independent of s. 245.10 and shall be enforced only when the provisions of s. 245.10 and utilization of the procedures thereunder are stayed or enjoined by the order of any court.

SECTION 4. 245.12 (1) of the statutes is amended to read:

245.12 (1) If ss. 245.02, 245.05, 245.06, 245.08, 245.09, and 245.10 *or 245.105* where applicable, are complied with, and if there is no prohibition against or legal objection to the marriage, the county clerk shall issue a marriage license; but after the application for such license ~~said~~ *the* clerk shall, upon the sworn statement of either of the applicants, correct any erroneous, false or insufficient statement in such license or in the application therefor which shall come to ~~his~~ *the clerk's* attention prior to the marriage and shall show the corrected statement as soon as reasonably possible to the other applicant.

SECTION 6. 247.02 of the statutes is repealed.

SECTION 6m. 247.02 (1) (i), (j) and (k) of the statutes are created to read:

247.02 (1) (i) To modify a judgment in an action affecting marriage granted in this state or elsewhere.

(j) For periodic family support payments.

(k) To seek court permission to remarry under s. 245.105.

EXHIBIT B

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-879

THOMAS E. ZABLOCKI, Milwaukee County Clerk, individually, in his official capacity, and on behalf of all persons similarly situated,
Appellants,

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ROGER G. REDHAIL, individually and on behalf of all persons similarly situated,
Appellees.

AFFIDAVIT

STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)

Ward L. Johnson, Jr., being first duly sworn, on oath deposes and says:

1. That I am an Assistant Attorney General for the State of Wisconsin assigned to the domestic relations field of law.

2. That no notice has been received by the office of the Attorney General in any completed case wherein an injunction was issued against the enforcement of sec. 245.10, Wis. Stats., (except the Redhail case presently on appeal to the U.S. Supreme Court).

3. That no notice has been received by the office of the Attorney General in any pending case wherein a request has been made for an injunction against the enforcement of sec. 245.10, Wis. Stats.

/s/ Ward L. Johnson, Jr.
Ward L. Johnson, Jr.

Subscribed and sworn to before me this 21st day of October, 1977.

/s/ George B. Schwahn
Notary Public, State of Wisconsin
My commission is permanent.